TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. [redacted] 282

THE UNITED STATES, APPELLANT

vs.

WYCKOFF PIPE & CREOSOTING CO., INC.

APPEAL FROM THE COURT OF CLAIMS

FILED FEBRUARY 17, 1925

(30876)

1 In Court of Claims of the United States

WYCKOFF PIPE & CREOSOTING CO., INC., plaintiff
vs.
THE UNITED STATES, defendant.
No. C. 19

I. *Petition. Filed January 29, 1923*

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

The plaintiff, the Wyckoff Pipe and Creosoting Company, Inc., respectfully represents:

First count

1. It is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Connecticut, and having its principal business office in the city of New York, State of New York, and engaged in the business of manufacturing.

2. On or about the tenth day of December, 1917, the plaintiff and the United States entered into a contract, a copy of which is
2 hereto annexed, marked "Exhibit A," and made a part hereof.

In said contract it was agreed that the plaintiff should furnish all labor and material to lay wood block floors in the structural shop, the machine shop, and the foundry at the United States Navy Yard, Norfolk, Virginia, in accordance with the provisions of specifications furnished by the United States.

3. The contract provided that the work to be done in the structural shop should be completed within thirty calendar days from the date a copy of the contract was delivered to plaintiff. The contract further provided that:

"The balance of the work under this contract shall be deferred until such time as the party of the second part is ready for the work to proceed, and the work in the machine shop shall be completed within forty-three (43) calendar days, and the work in the foundry shall be completed within eight (8) calendar days, from such date or dates as determined and fixed by the party of the second part. Provided, that notice shall be given by the party of the second part not less than ten (10) calendar days in advance of the date fixed upon as the date upon which the work in the machine shop, or the date upon which the work in the foundry, may be undertaken."

Paragraph 8 of the general provisions provided that the contractor should commence work immediately after the delivery to him of a copy of the contract and continue without interruption unless otherwise directed by the Government. Paragraph 6 of the special provisions of specification No. 2647, also constituting a part of the contract, provided that: "The contractor shall begin work in the structural shop as provided in paragraph 8 of the 'general
3 provisions'; in the machine shop about April 1, 1918, and in the foundry about May 1, 1918."

4. On December 22, 1917, by direction of the Chief of the Bureau of Ordnance, Navy Department, a copy of the contract was sent to plaintiff by registered mail, and receipt of same was acknowledged by plaintiff under date of December 24, 1917.

5. After the receipt of a copy of said contract, and although plaintiff was ready, willing and able to proceed immediately with the performance thereof, and with the laying of the flooring therein provided for, plaintiff was not permitted by defendant to proceed. Defendant advanced various and sundry reasons as to why the work could not be proceeded with, promising from time to time that plaintiff might commence the work within a week or within a few weeks; invariably, however, when these extended periods of time arrived, further delaying and preventing the plaintiff from proceeding. This course of conduct upon the part of defendant's authorized officers and agents continued until January 1, 1919. On this date defendant permitted plaintiff to proceed with the laying of the flooring in the structural shop, but plaintiff was not allowed to commence the work in the foundry until August 1919, nor was it allowed to proceed with the work in the machine shop until January and April, 1920. Defendant unreasonably and unwarrantably delayed plaintiff in the performance of the contract work, materially increasing the cost of the work to plaintiff. Had defendant not thus delayed, hindered, and interfered with the plaintiff, who was at all times ready, able and willing to perform its part of the contract, the work could have been completed within the period of time contemplated by the contract, if not before.

4 6. When plaintiff was finally instructed to proceed with the performance of the contract, it expressed its willingness to do so, but asked permission to reserve all its claims because of the long, unanticipated delay in the commencement of the work; and the Government official in charge of the work wrote to plaintiff stating that the justice of the main contention in these claims was recognized, and agreeing that complete claims for the increased cost of the work might be made upon the completion thereof. (Exhibit B, hereto annexed.)

7. When plaintiff was allowed to proceed with the work in the structural shop, after a delay of twelve (12) months caused wholly by the defendant, the cost of prosecuting said work had increased from $2.26 to $2.68 per square yard, an increase of 42 c. a square yard, the said increased cost for the 4,216 yards of flooring laid in the structural shop amounting to $1,770.72. When plaintiff was allowed to proceed with the 233 yards originally estimated for in the foundry, after a delay of 15 months, caused wholly by the defendant, the cost of prosecuting said work had increased from $2.26 to $3.10 per square yard, an increase of 84 c. a square yard, the said increased cost for the 233 yards amounting to $195.72. When plaintiff was allowed to proceed with the 3,411 additional yards found necessary in the foundry, after a delay of 8 months, caused wholly by the defendant, the cost of prosecuting said work had increased from $2.68 per yard, the price agreed upon in December 1918, to

$3.10 per yard, the cost of the work in August 1919, an increase of 42 c. a square yard, the said increased cost for the 3,411 yards amounting to $1,432.62. When plaintiff was allowed to proceed with the work in the machine shop, after a delay of from 21 month to 24 months, caused wholly by defendant, the cost
5 of prosecuting the said work had increased at least $1.02 a square yard, the increased cost of the 6,838 yards of the flooring laid in the machine shop under the original contract, amounting to $6 974.76, the total increased cost of the work in the three shops occasioned solely by defendant, amounting to $10 373.82.

Second count

Plaintiff further showing to the court respectfully represents:

1. That on the twenty-ninth day of January, 1920, plaintiff entered into a contract with defendant, through the commanding officer of Watervliet Arsenal, for the furnishing of certain wooden creosoted yellow pine floor blocks, a copy of which contract is hereto annexed, marked "Exhibit C," and prayed to be made a part of this petition.

2. In said contract it was provided that seventy thousand (70,000) of said blocks were to be delivered each week beginning February 28, 1920, and that the delivery should be completed on or before March 29, 1920. Said contract further provided in article 7 thereof, that in the event the contractor failed to deliver the material contracted for, at the rate or within the period within which delivery was due under the contract, liquidated damages should be deducted at the rate of one-thirtieth (1/30) of one per cent (1%) of the contract price for each and every day of delay in delivery beyond the date stipulated. But it was also provided in said article 7, that the contractor should receive credit for all delays which the contracting officer or his successor might determine to have been due to the action of the United States, or delays due to unavoidable causes, in-
6 cluding fires, unseasonably severe storms, and labor strikes in the works of the contractor.

3. Further showing to the court, plaintiff alleges that due to the refusal of common carriers under Government control, to remove loaded cars tendered for transportation, and notice from common carriers under Government control that they would not move further material if loaded and tendered, as well as the slow movement of shipments, due to the blockade of freight, extending the transit time in some cases more than six times that normally required, as well as to the preferment given by the United States Railroad Administration to perishable commodities, the plaintiff was unable to complete deliveries in accordance with the schedule set forth in the contract above referred to. After, however, certain deliveries were completed, plaintiff in due course made application to the contracting officer for an extension of time within which to complete the contract in accordance with the terms thereof. The contracting officer allowed plaintiff such extension of time as would save to the plaintiff in liquidated damages, the sum of $186.45, but assessed against the

plaintiff liquidated damages in the amount of $388.38. Subsequent to the failure of the Government to deduct liquidated damages in the amount of $186.45, in accordance with the decision of the contracting officer, the accounting officers of the Government refused to pass for payment the vouchers of the contracting officer allowing such deduction. The contracting officer in turn called upon plaintiff to refund to him the sum of $186.45, which had been previously paid to the plaintiff. The plaintiff protesting that the Government had no right in law or fact to demand the return of such sum, or any other sum, nevertheless paid the same in order that it might
7 not be charged back against the account of the contracting officer.

4. Plaintiff has been paid the amount the accounting officers of the Government have considered to be the sum due to the plaintiff, but such amount has been accepted by plaintiff only after vigorous protest, both orally and in writing, that the Government had no right in law or fact to make the deductions for liquidated damages hereinabove set out. Plaintiff alleges that all of the delays in the completion of the contract were occasioned solely and alone by the defendant and that under the terms of the contract such delays constituted delays caused by the United States, or delays arising from unavoidable causes over which plaintiff had no control whatsoever, and for which it should not be penalized.

5. Plaintiff therefore alleges that on this, the second count of its cause of action, it is entitled to recover from the United States, the sum of $574.83, which is justly due and owing to it, but which the United States refuses to pay.

6. No action has been taken on these claims, except that they have been presented to the accounting officers and by such officers in due course disallowed. The plaintiff is the only person owning or interested in the claims above set forth, and no assignment or transfer of the same, or any part thereof, or interest therein, has been made. The plaintiff is justly entitled to receive and recover from the United States for and on account of the aforesaid delays and damages, the sum of $10,948.65, after allowing all just credits and offsets. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against it.

8 Wherefore plaintiff prays judgment against the United States in the sum of $10,948.65 and for such other relief as this honorable court might grant, both at law and in equity, in the premises.

WYCKOFF PIPE AND CREOSOTING COMPANY,
By E. A. MITCHELL, *President.*

HARVEY D. JACOB,
Attorney for Plaintiff.
RICHARD P. WHITELEY,
HENRY C. HUNTER,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

E. A. Mitchell, being duly sworn, deposes and says that he is the president of the Wyckoff Pipe and Creosoting Company, the plaintiff in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

E. A. MITCHELL, *President.*

Subscribed and sworn to before me this 22nd day of January, A. D., 1923.

[SEAL.] JOHN J. MURPHY, *Notary Public.*

9 EXHIBIT A TO PETITION

Navy Department

MEMORANDUM COPY OF CONTRACT NO. 2647, BASED UPON PLANS AND SPECIFICATIONS PREPARED BY THE BUREAU OF YARDS AND DOCKS

[The original is on file in the office of the Auditor for the Navy Department]

This contract, of two parts made and concluded this 10th day of December, A. D. 1917, by and between the Wyckoff Pipe & Creosoting Co., Inc., a corporation of the State of Connecticut, having an office and place of business at No. 30 East 42nd Street, New York, New York, party of the first part, and the United States, party of the second part,

Witnesseth, that the said party of the first part and said party of the second part do covenant and agree to and with each other as follows:

First. For and in consideration of the payments to be made as hereinafter provided the party of the first part will furnish all labor and material and lay wood block floors in the structural shop, machine shop and foundry, at the navy yard, Norfolk, Virginia, in accordance with the provisions of specification No. 2647, as contemplated by item 1, paragraph 29 thereof, except as hereinafter modified.

Second. Said specification No. 2647 and the general provisions therein mentioned, together with addendum No. 1 dated November 3, 1917, to said general provisions, are appended hereto and form a part of this contract.

Third. The work to be done under this contract shall be completed within the times as hereinafter named:

The work in the structural shop, within thirty (30 calendar days from the date a copy of this contract is delivered to the party of the first part.

10 The balance of the work under this contract shall be deferred until such time as the party of the second part is ready for the work to proceed, and the work in the machine shop shall

be completed within forty-three (43) calendar days, and the work in the foundry shall be completed within eight (8) calendar days, from such date or dates as determined and fixed by the party of the second part. Provided, That notice shall be given by the party of the second part not less than ten (10) calendar days in advance of the date fixed upon as the date upon which the work in the machine shop, or the date upon which the work in the foundry, may be undertaken.

Fourth. The creasote oil to be furnished under this contract may be taken from stock or storage tanks of the party of the first part, and in lieu of the specification required for such oil, said oil shall meet the following requirements:

The preservative shall be a product manufactured entirely from coke-oven coal-tar, or from a mixed tar produced in the manufacture of illuminating gas.

(a) It shall not contain more than 3 per cent of water.

(b) The specific gravity at 38 degrees C. shall not be less than 1.03 nor more than 1 12.

(c) The oil shall be thoroughly liquid at 38 degrees C.

(d) The distillate, based on water-free oil, shall be within the following limits:

Up to 200 degrees C., not more than 5 per cent.

Up to 355 degrees C., at least 45 per cent and not to exceed 70 per cent.

The residue above 355 degrees C. shall be at least 25 per cent and not to exceed 50 per cent.

Fifth. In lieu of the pitch specified for joint filler, a fine clean, dry sand may be substituted, and in lieu of the paving pitch specified for expansion joints, a standard pitch commercially known as "low boiling pitch" may be substituted.

Sixth. The rules of the Southern Pine Association dated January 1, 1917, are hereby modified, in that the presence or absence of heartwood shall not enter into the inspection of the lumber.

11 Seventh. For and in consideration of the faithful performance of this contract the party of the first part shall be paid, upon vouchers prepared, certified, and approved in the usual manner and payable through such Navy pay office as the party of the second part may elect, the sum of two dollars and twenty-six ($2.26) per square yard in place in the manner provided in the specification aforesaid.

Eighth. Neither this contract nor any interest therein shall be transferred by the party of the first part to any other party or parties.

Ninth. No Member of or Delegate to Congress, nor any person holding any office or appointment under the Navy Department, is, or shall be, admitted to any share or part of this contract or to any benefit to arise therefrom: Provided, That this provision shall not be construed to extend to this contract if the same is made by an incorporated company for the general benefit of such company.

In the performance of this contract no person shall be employed who is undergoing sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction.

In witness whereof, the said parties hereto have hereunto set their hands the day and year first above written.

THE WYCKOFF PIPE & CREOSOTING CO., INC.
A. E. MITCHELL, *Vice President.*
THE UNITED STATES,
By A. L. PARSONS,
Acting Chief of the Bureau of Yards & Docks,
Acting Under the Direction of the Secretary of the Navy.

12 SPECIFICATION NO. 2647 FOR CREOSOTED WOOD BLOCK FLOORS FOR STRUCTURAL SHOP, MACHINE SHOP AND FOUNDRY AT THE NAVY YARD, NORFOLK, VA., UNDER APPROPRIATION NO. 8124, "IMPROVEMENT AND EQUIPMENT OF NAVY YARDS FOR THE CONSTRUCTION OF VESSELS"

General provisions

1. The general provisions entitled "General Provisions Forming Part of Specifications for Contracts for Public Works, Bureau of Yards and Docks, March 20, 1917," shall form a part of this specification and of any contract based hereon. Copies of the said "general provisions" may be had on application to the Chief of the Bureau of Yards and Docks or to the commandant of any navy yard or naval station.

Special provisions

2. General intention.—It is declared and acknowledged intention and meaning to provide and secure creosoted wood block floors, complete in place, in the structural shop, machine shop and foundry.

3. General description.—The floors will be laid on a concrete base furnished by the Government and will consist of creosoted wood blocks laid on a sand cushion. The joints will be filled with paving pitch and expansion joints provided as hereinafter specified.

4. General dimensions.—The approximate areas to be paved with block are as follows:

(a) Structural shop.—One bay 96 feet by 100 feet with deduction of space occupied by 46 foundations approximately 3½ feet by 6 feet and one bay 360 feet by 100 feet, with deduction of space
13 occupied by six foundations approximately 9 feet by 28 feet, and one foundation of irregular shape approximately 80 feet by 20 feet.

(b) Machine shop.—One bay 600 feet by 130 feet with deduction of space occupied by one foundation approximately 46 feet by 168 feet, one foundation approximately 36 feet by 36 feet, 120 foundations approximately 6 feet by 10 feet and 276 small piers, approximately 9 inches square.

(c) Foundry.—One bay 24 feet by 55 feet with deductions of space occupied by one foundation approximately 5 feet by 10 feet and one bay 24 feet by 80 feet with d duction of space occupied by one foundation approximately 24 feet by 35 feet and one foundation approximately 14 feet by 18 feet.

5. Location.—The wood block floors shall be located at the navy yard, Norfolk, Va., and in the structural shop, machine shop, and foundry. The exact locations will be indicated by the officer in charge.

6. Time of beginning work.—The contractor shall begin work in the structural shop as provided in paragraph 8 of the "gen ral provisions;" in the machine shop about April 1, 1918, and in the foundry about May 1, 1918.

7. Measurements.—Steel tapes only shall be used in laying out all work under the contract. The tapes used shall be compared from time to time with a Government standard tape.

8. Time of completion.—The attention of bidders is direct d to paragraph 9 of the "general provisions" relative to the time of completion. Bidders shall state separately the time of completion for the work in the structural shop, machine shop and foundry. Time of completion shall be count d, in case of the structural shop, from the time as specified in paragraph 9 of the "general provisions" in case of the machine shop and foundry from the time that the contractor is directed in writing by the officer in charge to begin work in each place.

9. Damages for delay in accordance with the provisions of
14 paragraph 13 of the "general provisions" shall be at the rate of $5 per calendar day for the work in each building.

10. Night work.—If the contractor d sires to carry on work at night or outside the regular hours, he shall make application to the officer in charge in ample time to enable satisfactory arrangements to be made by the Government for inspecting the work in progress. If granted permission, he shall light the different parts of the work in a manner satisfactory to the officer in charge and shall comply with all regulations.

11. Employment of labor.—The contractor shall not employ on the work any citiz n of nations with whom the United States is at war, nor of nations allied to or friendly with nations at war with the United States. Furthermore, the officer in charge shall have the right to demand the immediate removal of any individual from the work, and where such demand is made the individual referred to shall be removed from the work and not again employed thereon. This right of r moval shall apply to all work done by the contractor, whether on the site or elsewhere.

12. Work to be done and material to be furnished by the Government.—The Government will furnish the concrete foundations for the floors, which will have a uniform thickness of not less than 6 inches and have its highest point 4¼ inches below the finished floor surface.

13. Government utilities available.—So far as the Government plant and the demands of the Government s rvice will permit, the contractor may obtain electric current for power and light, and water from the yard supply, and may use the railroad tracks, rolling stock and hoisting appliances of the yard system, paying for the materials and services at the prevailing Government rates. The Government will furnish and install one meter, one switch, and in case alternating current is used, one transformer, for electric current, also one water meter and shut-off for water mains, all within the limits of the area assigned to the contractor. The contractor shall provide, maintain, and repair all further wiring, poles, lamps, and accessories and all further piping and fittings required to transfer the electric current and water to the different parts of the work. The Governm nt will assume no liability for the failure of the supply of any of the above-mentioned utilities.

14. Samples required of contractor before work is begun.—The contractor shall submit to the officer in charge, for approval, samples of the wood block to be used in the work. Such samples shall represent the average block as to quality of timber, size of block, and smoothness of finish. He shall also submit a sample of the sand to be used. The contractor shall also submit such other samples of materials as may be required, whether specifically called for or not. Accepted samples may be used in the finished work. Materials shall conform to samples. The approval or acceptance of such samples shall not preclude the rejection of any material upon the discovery of defects previous to the acceptance of the completed work.

15. Limits assigned to contractor.—The attention of bidders is directed to paragraph 6 of the "general provisions" relative to the facilities furnished to contractor.

16. Removal of rubbish.—The attention of bidders is directed to paragraph 27 of the "general provisions" relative to the removal of rubbish from the site upon completion of the work.

Materials and workmanship

17. All materials and workmanship shall be of the best quality of their respective kinds unless other grades are specifically mentioned, and the acceptance of same is understood and agreed to be subject to the approval of the officer in charge.

18. Wood blocks shall be made from merchantable sound yellow-pine timber, graded in accordance with the rules of the Southern Pine Association, dated January 1, 1917. The timber will be subject, at the works, to inspection before being sawed into blocks. All blocks shall be free from all defects which would be detrimental to their life or strength or interfere with their being properly laid.

19. Size of blocks.—The blocks shall be 4 inches wide, 3½ inches deep, and shall average 8 inches in length. A variation in depth of $\frac{1}{16}$ inch and in width of $\frac{1}{16}$ inch will be allowed. Blocks may vary in length 1 inch either way from the nominal length specified.

20. Paving pitch.—The pitch filler for the joints between the pavings blocks shall be a straight-run American coal-tar pitch. Its specific gravity shall not be less than 1.22 at 60° F. Its melting point shall not be less than 145° F. It shall contain not less than 20 per cent nor more than 33 per cent of free carbon.

21. Preservative.—The preservative shall be a coal-tar product, of which at least 65 per cent shall be a distillate of coal-gas tar or coke-oven tar, and the remainder shall be refined coal-gas tar or coke-oven tar. The mixture shall comply with the following requirements:

(1) It shall not contain more than 3 per cent of water.

(2) It shall not contain more than 3 per cent of matter insoluble in benzol.

(3) The specific gravity at 38° C. shall not be less than 1.07 nor more than 1.12.

(4) The distillates based on water-free oil shall be within the following limits: Up to 210° C. not more than 5 per cent; up to 235° C. not more than 25 per cent. The residue above 355° C., if it exceeds 35 per cent, shall have a float test of not more than 80 seconds at 70° C.

(5) The specific gravity of the fraction between 235° and 315° C. shall not be less than 1.02 at 38° C. The specific gravity of the fraction between 315° and 355° C. shall not be less than 1.09 at 38° C.

(6) The oil shall not yield more than 10 per cent coke residue.

22. Treatment of blocks.—The blocks shall be treated with the preservative oil specified herein. The method of treating the block, while not being definitely described, shall comply with the
17 following requirements: The blocks shall not be heated to a temperature higher than 250° F. When treated with oil, the blocks shall be completely immersed therein and the oil shall be forced into the blocks under a sustained pressure of not less than 100 pounds per square inch until they have absorbed an amount of oil equivalent to from 10 to 12 pounds per cubic foot of the wood contained in the particular charge being treated. The blocks after treatment shall show satisfactory penetration of the oil throughout. All blocks that are in any way defective or that have been badly warped or checked in the process of treatment will be rejected.

23. Inspection.—The contractor shall notify the officer in charge 10 days before beginning treatment of the blocks as to the location where such treatment is to take place, in order that arrangements may be made for the inspection of the blocks on the part of the Government.

The Government inspector shall have access to all parts of the works in which the treatment is carried on and shall be given every facility for the inspection of materials and process.

24. Laying the blocks.—Blocks shall preferably be laid as soon as possible after being treated. If they can not be laid within two days, provision shall be made to prevent them from drying out by stacking in close piles and covering them, and, if possible, sprinkling them thoroughly at intervals. The blocks shall be well sprinkled, under the direction of the officer in charge, about two days before being laid.

The top surface of the floor shall conform to elevations given at various points on the building columns by the officer in charge.

Upon the concrete foundation shall be spread a layer of sand, of quality to be approved by the officer in charge, of a minimum thickness of three-quarters of an inch. This sand shall be spread evenly on the foundation immediately in advance of the block laying. Upon the sand bed, the blocks shall be carefully set, with their fibers vertical, in straight parallel courses. Each course shall
18 be laid so as to break joints with the preceding course. The blocks shall be set as closely together as practicable. After the blocks are thus set they shall be tamped with a hand rammer or rolled with a steam roller weighing not less than five (5) tons, as directed by the officer in charge, until the blocks are tamped or rolled to a firm seat in the sand bed and their tops brought truly to a uniform surface.

25. Filler.—The joints between the blocks shall be poured with paving-pitch mixture. To lessen the amount of coal-tar pitch required hot, dry, fine sand may be mixed with it. The amount of sand used shall not be so great as to prevent the mixture readily flowing into all the voids of the joints, and in no case shall it be greater than the volume of the coal-tar pitch. This latter may be cut with creosote oil, to assist the flow of the mixture, in the proportions of 13 gallons of creosote oil to 1,800 pounds of coal-tar pitch. All mixing of coal-tar pitch, creosote oil, and sand shall be done at the site of the work immediately before use.

26. Expansion joints.—There will be a paving-pitch expansion joint three-fourths of an inch wide along the outer edges of the wood-block floor, around all building piers, and around all machine and other foundations occurring within the area of the floor. Before pouring, the width of expansion joints shall be maintained with strips of wood until the floors have been rolled.

Proposals

27. Alternate bids.—The contractor shall submit alternative bids as provided in paragraph 29, items 3, 4, and 5.

Bids submitted under items 3 and 4 shall be based on the use of wood blocks laid on a pitch coating instead of sand. The blocks,

method of laying, filler for joints, and expansion joints shall be in every respect as specified herein except that the depth of blocks shall be 3 inches instead of 3½ inches.

Bids submitted under item 5 shall be based on the same materials and methods as required under items 3 and 4, but in addition the contractor shall raise the surface of the concrete foundation, prepared by the Government, 1¼ inches by adding a layer of
19 concrete of that thickness mixed in the proportion of 1 part cement, 3 parts sand, and 6 parts gravel or broken stone. Materials for and method of mixing and placing concrete shall be as directed by the officer in charge.

The pitch for coating foundations shall be as specified in paragraph 20 and shall be heated and stiffened with a suitable amount of fine grained sand and applied hot to a depth of ⅛ inch. The coating shall be applied immediately in advance of the blocks and shall be uniformly spread and leveled by means of a "squeegee" or other approved method.

28. Certified check and bond.—Each proposal must be accompanied by a certified check, payable to the Chief of the Bureau of Yards and Docks, for the sum of $750 as a guaranty that the bidder will not without cause, approved by the Chief of the Bureau of Yards and Docks, withdraw his bid, and that if awarded to him he will execute the required contract within 10 days after its delivery to him for that purpose, and give a bond (preferably that of a first-class surety company) in a penal sum equal to 30 per cent of the contract price, conditioned upon the faithful performance of the contract. This bond is not required with the proposal. Checks of unsuccessful bidders will be returned immediately after the contract is awarded, and of the successful bidder upon the execution of the contract.

29. Form of proposals.—Proposals shall be submitted in sealed packages addressed to the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., and plainly marked or indorsed in ink on the outside face "Proposals for Wood Block Paving, Norfolk, Va." Proposals and all exhibits, alternative plans, letters of explanation, circulars, and all other papers (except the certified check) which it is desired to have considered in connection therewith must be made in duplicate. Government specifications should not be inclosed with the proposal. Specification in possession of unsuccessful bidders shall be returned to the bureau immediately after the contract is awarded. Bidders are expected to read the specification with special care and to observe all of
20 its requirements. Except in so far as proposals shall, under a special heading for the purpose, call attention to every particular wherein same conflicts with the requirements of the specifications, the latter shall govern and be complied with to the satisfaction of the Chief of the Bureau of Yards and Docks at the expense of the contractor. Proposals shall be made in ink or typewriting, without erasure, upon the prescribed blanks furnished bidders as follows:

Item 1: Net price per square yard for wood block floor, complete, laid on a sand cushion in the structural shop, machine shop, and foundry.

Item 2: Net price per square yard for wood block floor, complete, laid on a sand cushion, in the structural shop only.

Item 3: Net price per square yard for wood block floor, complete, using blocks 3 inches deep on a pitch coating, laid in the structural shop, machine shop, and foundry, in accordance with paragraph 27.

Item 4: Net price per square yard for wood block floor, complete, using blocks 3 inches deep on a pitch coating, laid in the machine shop and foundry only, in accordance with paragraph 27.

Item 5: Net price per square yard for wood block floor, complete, using blocks 3 inches deep on a pitch coating applied to a layer of concrete 1¼ inches thick, provided by the contractor, laid in accordance with paragraph 27, but in the structural shop only.

Item 6: Number of calendar days required to complete the work in the structural shop.

Item 7: Number of calendar days required to complete the work in the machine shop.

Item 8: Number of calendar days required to complete the work in the foundry.

30. Eight-hour law—The contractor will have the right, under the contract, to employ labor in excess of eight hours per day, in view of the present emergency conditions; such employment in excess of eight hours, however, shall be paid for at the rate of not less than time and one-half time. Attention of bidders is directed to the
21 Executive order dated March 22, 1917, which authorizes suspension of the limitation of eight hours' work on Government contracts.

31. Evaluation of bids.—The attention of bidders is directed to paragraph 10 of the "general provisions" relative to the evaluation of bids.

32. Acceptance and rejection of proposals.—The Government reserves the right to accept any bid, to waive any defects and informalities in the proposals, and to reject any or all bids.

33. Bidder's ability.—Before he is awarded the contract, any bidder may be required to show that he has the necessary capital, facilities, experience, and ability to begin the work promptly and perform it in a satisfactory manner, and that he is regularly engaged in the business of performing such work.

34. Examination of site.—Intending bidders are expected to examine the site of the proposed work and inform themselves thoroughly of the actual conditions and requirements before submitting proposals.

35. Information.—For any further information needed by intending bidders, application should be made to the Chief of the Bureau of Yards and Docks or the navy yard, Norfolk, Va. Any discrepancies or omissions noted by intending bidders in drawings or specifications should be promptly referred to the Chief of the

Bureau of Yards and Docks, Navy Department, Washington, D. C., for correction or interpretation before the opening of bids.

NAVY DEPARTMENT,
Bureau of Yards and Docks, October 22, 1917.

GENERAL PROVISIONS FORMING PART OF SPECIFICATION FOR CONTRACTS FOR PUBLIC WORKS

NAVY DEPARTMENT,
Bureau of Yards and Docks, March 20, 1917.

1. Contract.—The contract to cover the work to be done will
22 be based upon these general provisions, the detailed specification of the work, and the plans or other papers to which such detailed specification refers, all of which will be attached to and form a part of the contract. The successful bidder will be the party of the first part to the contract and will be known as the contractor, and the Navy Department will be the party of the second part and known as the Government.

2. Government representatives.—The work will be under the general direction of the Chief of the Bureau of Yards and Docks, acting under instructions of the Secretary of the Navy. A resident officer of the Corps of Civil Engineers, United States Navy, or other officer or representative of the Government, known as the officer in charge, will have immediate charge and supervision of the work and of all details thereof, including inspection. Appeals may be made to the resident senior naval officer, to the Chief of the Bureau of Yards and Docks, and to the Secretary of the Navy, in the order named.

3. Control of work.—The Government, by its officer in charge, shall at all times exercise full supervision and general direction of all work under the contract so far as it affects the interests of the Government, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such officer in charge, subject to appeal, provided that it shall be distinctly understood that the supervision and general direction of all work under the contract by the officer in charge shall not relieve the contractor of responsibility for the full protection of and responsibility for his work, both as regards sufficiency and time of execution.

4. Omissions and misdescriptions.—The omission from the contract or from the plans, specifications, or other papers attached thereto and forming a part thereof or the misdescription of any details of work the proper performance of which is evidently necessary to carry out fully the general intention expressed in the detailed specifications of the work shall not operate to release
23 the contractor from performing such work, but the same shall be fully and properly performed in the same manner as if fully and correctly indicated, described, and required in and by the contract and without expense to the Government in addition to the contract price.

5. Discrepancies.—The specifications and plans forming part of the contract shall be considered as supplementary one to the other, so that materials and workmanship indicated, called for, or necessarily implied by the one and not by the other shall be supplied and worked into place the same as though specifically called for by both. Should any discrepancy be found to exist between plans and specifications or any parts of either, or should the language of any part of the contract prove to be ambiguous or doubtful, the officer in charge will decide as to the true intent and meaning.

6. Facilities.—Unless otherwise specifically stated, the contractor shall be allowed reasonable space at the site of the work and access to the same for receiving, handling, storing, and working material. Employees, material, and plant shall be confined to the space as signed. Upon the completion of the work the contractor shall remove all of his surplus material, machinery, tools, etc., from the property of the Government, and upon failure so to do within 30 days from date of notice to remove they may be treated as abandoned property.

7. Employees.—The contractor shall employ only competent, careful, orderly persons upon the work; and if at any time it shall appear to the officer in charge that any person employed upon the work is incompetent, careless, reckless, or disorderly, or disobeys or evades orders or instructions or shirks his duty, such person shall be immediately discharged from and not again employed upon the work. Such discharge may be directed by the officer in charge, and if not acceptable to the contractor shall be nevertheless immediately effected preceding any appeal. No person undergoing sentence of imprisonment at hard labor shall be employed on the work. The con-
24 tractor shall, in the prosecution of the work, take such measures for the safety of life and limb as will meet and satisfy the requirements of the laws of the State where the work is done.

8. Time of commencement of work.—The contractor shall commence work immediately after the delivery to him of a copy of the contract and continue without interruption unless otherwise directed by the Government.

9. Time of completion.—Each bidder shall state the number of calendar days required to complete the work, counting from the date a copy of the signed contract is delivered to him.

10. Evaluation of bids.—Bids will be evaluated on the basis of the agreed damages per day in each case where different times for completion are named by bidders, the shortest time being taken as the standard, and other bids increased at the per diem rate to cover the increased time required. Bidders are at liberty to submit as many bids as they desire, naming different periods of time for completion of the work.

11. Continuance of work after time.—It is mutually understood and agreed that in the event of the work not being completed within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, unless

otherwise directed by the Government, in writing, and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms: Provided, That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the Government of its right to annul or terminate said contract for abandonment or failure to complete within the time specified or to impose and deduct damages as hereinafter provided.

12. Extension of time.—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated, shall be deemed and construed as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department Bureau of Yards and Docks, in the premises as conclusive and binding.

13. Damages for delay.—In case the work is not completed within the time specified in the contract, or within such extension of the contract time as may be allowed, it is distinctly understood and agreed that deductions at the rate named in the specifications of the work shall be made as liquidated damages and not as penalty from the contract price for each and every calendar day after and exclusive of the date within which the completion was required up to and including the date of completion, said sum being specifically agreed upon as a measure of damage to the Government by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract.

14. Unavoidable delays.—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides, or strikes of such scope and character as to interefere materially with the progress of the work. Delays caused by acts of the Government will be regarded as unavoidable delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in

market conditions, or by necessary time taken in submitting, checking, and correcting drawings or inspecting material, or by similar causes, will not be regarded as unavoidable. Should any delay in the progress of the work seem likely to occur at any time, the contractor shall notify the officer in charge in writing of the anticipated or actual delay, in order that a suitable record of the same may be made. (See par. 12.)

15. Progress.—The contractor, if so directed, shall furnish on a prescribed form a schedule of expected progress on the work under the contract, showing approximately the dates on which each part or division of the work is expected to be begun and finished. The contractor shall also forward to the officer in charge as soon as practicable after the first day of each month a summary report of the progress of the various parts of the work under the contract in the mills or shops and in the field, stating the existing status, rate of progress, estimated time of completion, cause of delay, if any, etc.

16. Annulment of contract.—If at any time the progress of the work shall have been such as to show that the work can not be completed within the time allowed, or should any provision of the contract be violated by the contractor, the Chief of the Bureau of Yards and Docks may, if in his opinion the interests of the Government demand it, declare the contract null and void without prejudice to the right of the Government to recover for default therein or violations thereof. Should the contract be declared null and void, the contractor agrees that the Government may hold all material delivered and work done under the contract and all machinery, tools, appliances, and accessories upon the site of the work or used in connection therewith pending the completion of the work covered by the contract unless allowed or directed to remove them in whole or in part. If the contractor is directed to remove the whole or
27 any part of said machinery, tools, appliances, and accessories and fails or neglects to do so within 30 days after notice, the Government shall thenceforth be free from any responsibility for the care or preservation thereof and shall be entitled to reimbursement for any expense incurred in connection therewith. Upon the annulment of the contract a board of officers, or other representatives of the Government, shall be appointed, which shall ascertain and determine the value of all material delivered and work done, including a fair and reasonable margin of profit thereon, and upon the approval of the findings of said board by the Chief of the Bureau of Yards and Docks, the Government may proceed to complete the work according to the contract, with such changes as may subsequently be found necessary or desirable, in such manner and by such means as it may deem advisable, and may, if the interests of the Government demand it, use or employ any material, tools, machinery, appliances, and accessories belonging to or furnished by the contractor for use in connection with the work covered by the contract. Said board shall also inventory and estimate the value of

said material, tools, machinery, appliances, and accessories, and said inventory and estimate shall, if approved by the Chief of the Bureau of Yards and Docks, be conclusive in any accounting between the parties to the contract: Provided, That the Government shall not be liable for depreciation by ordinary wear and tear, or injury or destruction by superior force, or for such material or articles as are consumed in use. Upon the completion of the work the cost of completing the same shall be ascertaining and determined and when approved by the Chief of the Bureau of Yards and Docks, shall be final, conclusive, and binding upon all parties; and should the total cost of the work, including payments made to the contractor, exceed the contract price, modified by the cost of any changes made before or after annulment, determined as provided in the following paragraph, the difference shall be charged to the contractor, who undertakes and promises to pay the same upon
28 demand. Should the total cost of the work be less than the contract price, the contractor shall be credited with the difference between the contract price, as modified by changes, and the total cost of the work, provided the amount so credited shall not exceed the amount found by the board above mentioned to be the value of the material delivered and work done by the contractor, less previous payments to him.

17. Changes.—The Government reserves the right to make such changes in the contract, plans, and specifications as may be deemed necessary or advisable, and the contractor agrees to proceed with such changes as directed in writing by the Chief of the Bureau of Yards and Docks. The cost of said changes shall be estimated by the officer in charge, and, if less than $500, shall be ascertained by him. If the cost of said charges is $500 or more, as estimated by the officer in charge, the same shall be ascertained by a board of not less than three officers or other representatives of the Government. The cost of the changes as ascertained above, when approved by the Chief of the Bureau of Yards and Docks, shall be added to or deducted from the contract price, and the contractor agrees and consents that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract: Provided, That the increased cost shall be the estimated actual cost to the contractor at the time of such estimate and that the decreased cost shall be the actual or market value at the time the contract was made, both plus a profit of 10 per cent.

18. Extras.—The contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract. Should the contractor at any time consider that he is being required to furnish any material or labor not called for by the contract, a written itemized claim for compensation therefor must be submitted by him to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items, if any. The failure or neglect of the con-

tractor to present, as above, his claim for the material or labor alleged to be extra within 60 days after being required to furnish or perform the same shall be deemed and construed as a waiver of all claim and right to additional compensation for the furnishing or performance of the alleged extra material or labor, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding.

19. Oral modifications.—It is distinctly understood and agreed that no oral statement of any person whomsoever shall be allowed in any manner or degree to modify or otherwise affect the terms of the specifications, plans, or the contract. Changes shall be made only as herein elsewhere specified.

20. Patents.—The contractor shall forever protect and defend the Government in the full and free use and enjoyment of any and all necessary rights to any invention, machine, or device which may be applied as a part of the work, either in its construction or use after completion, against the demands of all persons whomsoever.

21. Contractor's responsibility.—The contractor shall be responsible for the entire work contemplated by the contract and every part thereof and for all tools, appliances, and property of every description used in connection therewith. All methods of work, tools, appliances, and auxiliaries of all descriptions shall be safe and sufficient, and, if found by the officer in charge not to be so, shall be made satisfactory by the contractor without delay. The contractor shall specifically and distinctly assume all risks connected with the work, and shall be held liable for all damage or injury to property used or persons employed on or in connection with the work and all damage or injury to any person or property, wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the Government against all claims and to reimburse it for any outlay on account of any such damage or injury.

22. Supervision.—The contractor shall give the work his personal attention and shall be present on the site of the work continually during its progress, either in person or by duly authorized representative, to receive directions or instructions from the officer in charge. The name of such authorized representative shall be communicated in writing to the officer in charge.

23. Eight-hour law.—Special attention is called to the provisions of the laws relating to hours of labor upon public works. Any violation of said laws coming to the notice of the Government officers or employees will be reported to the Navy Department for such legal action as may appear warranted.

Subject to the provision of section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by the contract in the employ of the contractor or any subcontractor contracting for any part of said work contem-

plated shall be required or permitted to work more than eight hours in any calendar day upon such work. For each violation of this provision a penalty of $5 shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the Government from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

24. Special plans.—Wherever it shall be necessary, the contractor shall make special or detail plans in amplification of the contract plans, or in furtherance of the specifications, before proceeding with the execution of the work. Such plans shall be submitted to the officer in charge or Chief of Bureau of Yards and Docks, as may be directed, in the form of blue prints; in duplicate, for consideration, correction, or approval. When approved, one set of these prints shall be returned to the contractor so marked. When changes
31 or corrections are necessary, one set shall be returned to the contractor so noted, and he shall proceed as before with the submission of duplicate prints. When any plan has been approved, the contractor shall furnish the officer in charge with additional blue-print copies, or with the tracing, or an equivalent as regards the facility for printing. If a tracing is submitted, the Government will make such prints as it may require and will return the tracing to the contractor. On the completion of the work the contractor shall, if so directed, furnish the Government with one complete set of Vandyke prints, on cloth, of all approved plans. When the work of the contractor is of a nature orginating with him, full general and detail plans shall be furnished to the Government in the form of tracings, or the equivalent as regards facility for printing, which shall, upon approval, become the property of the Government, approved sets or prints being furnished to the contractor. The approval of the general and detail plans of the contractor shall in all cases be of a general nature relating to their sufficiency and compliance with the intention of the contract, and shall not relieve the contractor from errors, discrepancies, or omissions therein contained, which shall be made good whenever found..

25. Checking plans and dimensions; lines and levels.—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the officer in charge of any discrepancies discovered therein. Figures marked on plans shall, in general, be followed in preference to scale measurements, but the contractor must compare all plans and verify the figures before laying out the work and will be held responsible for any errors therein that might have been avoided. Large-scale plans shall, in general, govern small-scale plans. In all cases where dimensions are governed by conditions already established the contractor must depend entirely upon measurements taken by himself, scale or figured dimensions to the contrary notwithstanding; but no deviation from the speci-

fied dimensions will be allowed unless authorized by the officer in charge. The contractor shall be held responsible for the lines and levels of his work, which upon completion shall the intention of the contract.

Inspe tion.—The contractor must afford every facility neces- for the safe and convenient inspection of the work throughout nstruction. The officer in charge shall have power to reject ial and workmanship which are not in accordance with the act, and all such must be removed promptly by the contractor eplaced to the satisfaction of the officer in charge without extra se to the Government. Should it be deemed advisable by the in charge to make an examination of work already completed moving or tearing out the same, the contractor shall furnish all sary facilities, labor, and material. If the work is found to be tive in any respect, due to the fault of the contractor, he shall y all the expenses of such examination and of satisfactory re- truction. If the work be found to meet the requirements of the act, the actual cost of the examination plus 10 per cent will lowed to the contractor, and the contractor shall be granted a ble extension of time on account of the additional work in- d, provided su h extension of time is clearly warranted. Pro- al acceptance in the course of construction shall not preclude ion upon the discovery of defects previous to acceptance of the ected work. All inspection of material and workmanship will de, unless otherwise provided, after delivery at the site. When ial is to be inspe ted at the factory, the "Instructions relative tory inspection of machinery and material, coming under the zance of the Bureau of Yards and Docks, Navy Department," form a part of the contract. Material rejected at the place of facture or elsewhere shall not be delivered on the site of the , and material rejected at the site of the work shall be at once ctly isolated and, as soon as possible, removed from the Gov- ernment reservation, and not returned thereto.

27. Order, protection, and completion of work.—The contrac- tor shall protect his materials and work from deterioration and ge during construction, and upon completion shall without de- move his plant and all surplus material and rubbish from the The contractor will be required to carry on his work without fering with the ordinary use of the streets or with the operations her contractors or delaying or hindering any work done by the rnment, whether upon the site or not. He shall make good any ge to property of the Government caused by his operations. It is rstood and agreed that the parties to the contract will, so far ssible, labor to mutual advantage where their several works e above-mentioned or in unforeseen instances touch upon or fere with each other. Mutual concessions under the direction e officer in charge shall be made to secure this end.

Schedule of prices.—Before the first payment becomes due the actor shall submit to the officer in charge an itemized schedule

of prices on prescribed forms furnished by the officer in charge. The officer in charge will check such schedule and forward it to the Bureau of Yards and Docks with his recommendation and the schedule, after it has been approved by the bureau, will govern the preparation of monthly estimates. Allowance for nonperishable material delivered at the site of the work will be made only when it appears to the satisfaction of the officer in charge that such material will be worked into place within a reasonable time after date of delivery, and the officer in charge shall determine what period shall constitute a reasonable time after delivery. Allowance will be made for such temporary work as is of intrinsic value to the Government for the time being, such as cofferdam, sheet piling, cribwork, dikes, concrete forms, scaffolding, etc., when such work constructed in accordance with general plans submitted by the contractor is in place and completed and found by the officer in
34 charge to be sufficient for the purpose for which it was constructed: Provided, however, That allowance in any payment on account of such temporary work shall not be disproportionate to the value of other work included therein, to be determined by the officer in charge and that payment shall place no responsibility on the Government for the success or failure of the structure on account of which payment is allowed. The prices to be allowed for material for use in temporary work shall be the estimated actual value to the Government should the contractor fail to proceed with the contract to completion. The prices for material used in the permanent structure shall be the actual current market value as nearly as may be ascertainable. The difference between the total of the schedule of prices prepared as above indicated and the contract price shall be distributed among all the items of the schedule so that the total of the approved schedule shall in every case equal the total contract price. When the contract or any part thereof is based on unit prices and estimated quantities, these quantities and unit prices shall be employed in the schedule. Whenever the contract price is increased or decreased by supplementary agreement or order, the schedule of prices shall be amended to conform to the increased or decreased contract price.

29. Payments and reservations.—Vouchers will be prepared by the officer in charge of the work as soon as practicable after the end of each month, covering his estimate, according to the schedule of prices, of all material delivered, material worked into place, and work done to date. From such gross estimate will be deducted the next previous gross estimate, if any, and 10 per cent of the difference unless otherwise specified. The contractor shall certify to the correctness, justness, and nonpayment of said vouchers, after which they will be forwarded to the Bureau of Yards and Docks for approval and for reference to the Paymaster General of the Navy for payment by check. Upon the completion of the contract the balance due on account thereof will be covered by similar vouchers, subject
35 to any credits in favor of the Government: Provided, That the contractor shall first execute and deliver a final release to the

Government, in such form and containing such provisions as shall be approved by the Navy Department, of claims against the Government arising under or by virtue of the contract.

30. Lien.—The Government shall have a lien upon the material entering into the work under the contract for all moneys paid for and on account thereof, which lien shall begin with the first payment, and shall thereupon attach to the work done and materials furnished, and shall, in like manner, attach from time to time as the work progresses and as further payments are made, and shall continue until it shall have been properly discharged; and said lien hereby provided is pursuant to the act of Congress approved August 22, 1911, paramount.

31. Subcontracts.—The contractor shall furnish the officer in charge, for the information of the Bureau of Yards and Docks, immediately upon the exe ution of any subcontract, a statement showing the name and address of the subcontractor, the character and location of the work involved, date of contract, time limit, if any, and amount of money agreed to be paid. This does not include material men performing no labor nor persons employed individually.

NAVY DEPARTMENT,
Bureau of Yards and Docks, March 20, 1917.

36 ADDENDUM NO. 1 TO THE GENERAL PROVISIONS FORMING PART OF SPECIFICATIONS FOR CONTRACTS FOR PUBLIC WORKS

NAVY DEPARTMENT,
Bureau of Yards and Docks, November 3, 1917.

1. Adjustment of wages.—If, after the date of the contract, there shall be any increase in the rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done, that shall ne essitate payment by the contractor, on account of labor employed exclusively upon such work, of rates of wages in excess of those prevailing in such vicinity at the date of the contract, he shall receive additional compensation in a sum equal to one-half the amount of the increase in the rates of wages so required to be paid by him over the rates prevailing at the date of the contract: Provided, that in determining such additional compensation wages paid by the contractor at any time during the continuance of the contract in excess of the rates prevailing in the vicinity at the time of such payment shall be disregarded to the extent of such excess: And provided further, that any increase over wage rates prevailing at the date of the contract before being granted by the contractor shall be notified to and approved in writing by the Bureau of Yards and Docks. For the purposes of this paragraph rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done shall be understood to mean the established rates of wages in the nearest navy yard or station if there be one within 50

miles of such place, or, if there be none within that distance, the rates of wages paid under a well-established wage scale, if any, in such vicinity, or, if there be none, such reasonable rates of
37 wages as may be determined by the Navy Department, Bureau of Yards and Docks. The burden shall be upon the contractor of establishing, to the complete satisfaction of the Bureau of Yards and Docks, all facts upon which any claim for additional compensation hereunder shall rest, and all questions growing out of any such claim shall be determined by the Navy Department, Bureau of Yards and Docks, whose decision thereof shall be final and conclusive. Determination of such claims shall be deferred until the completion of the contract.

2. *Protection of plants.*—In addition to the ordinary precautions heretofore adopted by the contractor for the guarding and protection of its plant and work, the contractor shall provide such additional watchmen and devices for protection of its plant and property and the work in process for the Navy Department against espionage, acts of war and of alien enemies as may be required by the Navy Department. The contractor shall, when required, report to the Navy Department the citizenship, country of birth, or alien status of any and all of its employees. When required by the Navy Department, the contractor shall refuse to employ or, if already employed, forthwith discharge from employment and exclude from its works any person or persons designated by the Navy Department for cause as undesirable for employment on work for the Navy Department. The cost of such additional watchmen and devices as may be required by the Navy Department for said purposes will be borne by the Government. This provision shall be effective only during the period of war.

38 EXHIBIT B TO PETITION

Jan. 30th, 1919.

ACTING PUBLIC WORKS OFFICER,
U. S. Navy Yard, Norfolk, Va.

DEAR SIR: With reference to progress on our contract 2647, we wish to inquire if a monthly estimate will be prepared at the end of this month of the materials furnished and the work done without the necessity that we submit any invoices.

There will be due us in accordance with section 29 of the general provisions, a 90% payment for the materials furnished and work done and for your information we wish to state that up to and including our shipments of January 22nd, in cars 807114 and 292266, we have delivered 2,500 yards of block and since that date we will have nearly or quite completed the 4,200 yards of block which have been ordered forward to date.

We have also completed pre-molded expansion joints sufficient to lay 11,704 square yards which is in full for this item in our con-

tract and which we have previously invoiced for in the account of $292.60, you having advised us that this bill would be approved for payment together with the first other estimate on account of contract 2647. The account of estimate due us under item 3 (laying pavement) at 40½ c. per square yard will be subject to your estimate as our sub-contractor has not yet given us the information from which to submit an invoice although we understand that he is completing the pavement as fast as we deliver the blocks.

If matters are not in shape to prepare the monthly estimate please advise us what invoices are required.

In connection with section 18, of the general provisions please note that we shall have certain claims for extras and we request that you kindly advise us if these claims should be allowed
39 to go until the completion of the contract and if we may do so without losing or waiving any of our rights in the matter by reason of the clause in section 18, placing a limit of 60 days time on the making of such claims.

The nature of our claims will consist of a claim for the adjustment of extra labor on account of the advance in wages, having been anticipated by addendum No. 1 dated November 3rd, 1917, and forming a part of the contract. We also propose to submit certain claims for the consideration of the department by reason of the long, unanticipated delay in ordering this work to proceed, the contract having been dated December 10th, 1917, with the understanding that the work in the structural shop would be performed in the first half of 1918. The excessive delay which has not been on the part of this company seems likely to result in a loss to us in the performance of the contract. Contributory to such anticipated loss will enter such elements as:

Renewal premiums on surety company contract bond.

Additional freight rates on sand and other materials.

Additional cost of creosote oil.

Storage insurance and carrying charges on a large stock of lumber which we have carried for the account of this contract for about two years, etc.

We do not feel in a position to enter these claims until the contract has actually been performed and the account of the extra expenses can be definitely ascertained. In other words we know we shall be under a large and unanticipated expense but we do not know what its exact amount will be.

Can we defer presenting these above mentioned claims whatever they may be until the completion of the contract without prejudice to us in view of section 18 of the general provisions?

Very truly yours,

THE WYCKOFF PIPE & CREOSOTING CO.

H/T. *Vice President.*

40 *Feb. 24th, 1919.*

W. N. MOORE,
Acting Public Works Officer,
U. S. Navy Yard, Norfolk, Va.

DEAR SIR: In answer to your favor of February 20th, 1919, stating that in connection with contract C–2647–2–D, vouchers for payment will be made out monthly and forwarded to us for approval.

We have received no such voucher for the month of January.

Please advise why voucher has not been forwarded and please let us have this voucher at your early convenience.

With regard to our letter of January 30th about which you have no record, we enclose herewith a copy of the letter and trust you may make an early reply to the points which we brought up therein.

Very truly yours,

THE WYCKOFF PIPE & CREOSOTING CO.

WYCKOFF PIPE & CREOSOTING CO., INC.,
30 E. 42nd Street, New York, N. Y.

Subject: Claim on contract 2647, wood block floor, navy yard, Norfolk, Va.

GENTLEMEN: Referring to your letter of Feb. 24 with regard to payment on your contract 2647, voucher for all payment to you to date had been prepared and forwarded to you in the amount of $8,238.66. Referring to the claim as set forth in your letter of Feb. 25, and in the copy of your letter of January 30, not hitherto received, the justice of the main contention in these claims is recognized, and on account of the fact that the delay, caused in
41 your contract by the installation of the floor, performed by the Government, making the amount of claim uncertain at the present time, it will be satisfactory for you to make this claim for a definite amount in detail upon the completion of your work.

Respectfully,

W. N. MOORE,
Lieutenant, U. S. N., Civil Engineer Corps,
Acting Public Works Officer.

42 EXHIBIT C TO PETITION

These articles of agreement entered into this twenty-ninth day of January, 1920, between the Wyckoff Pipe & Creosoting Co., Inc., of New York, in the county of New York, State of New York (hereinafter referred to as the contractor), of the first part, and the United States of America, by the commanding officer of Watervliet Arsenal (hereinafter referred to as the contracting officer), acting by authority of the Secretary of War, of the second part.

Witness, that the said parties have mutually agreed and by these presents do mutually covenant and agree to and with each other as follows, viz:

ARTICLE 1. In accordance with his proposal dated the third day of January, 1920, submitted in response to advertisement dated the twenty-sixth day of December, 1919, the contractor shall furnish for the Ordnance Department, U. S. Army, the following material, viz:

280,000 blocks, floor, wood, creosote, yellow pine, 4 in. x 8 in. x 3½ in. deep—12 lbs. of oil per cu. ft. for seven cents ($.07) each.

Delivery shall be made at Watervliet Arsenal, Watervliet, N. Y., as follows:

70,000 blocks shall be delivered each week beginning February 28th, 1920, and delivery shall be completed on or before March 29th, 1920.

Covenant against contingent fees

The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by him hereunder; and that he
43 has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to him hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid. Provided, however, it is understood that this covenant does not apply to the selling of goods through a bona fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part, by commissions on sales made, nor to the selling of goods through established commercial or selling agents or agencies regularly engaged in selling such goods.

Laws and restrictions relative to labor

All work required in carrying out this contract shall be performed in full compliance with the laws of the State, Territory, or District of Columbia where such labor is performed: Provided, that the contractor shall not employ in the performance of this contract any minor under the age of 14 years or permit any minor between the age of 14 and 16 years to work more than eight hours in any one

day, more than six days in any one week, or before six a. m. or after seven p. m. Nor shall the contractor directly or indirectly employ any person undergoing sentence of imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality having criminal jurisdiction. Provided, however, that the President of the United States may by Executive order
44 modify this provision with respect to the employment of convict labor and provide the terms and conditions upon which said labor may be employed. These provisions shall be of the essence of the contract.

Copies of the following letters are attached hereto and form part of this contract:

Letter of contracting officer, dated February 16th, 1920.

Letter of contractor in reply thereto, dated February 20th, 1920.

ARTICLE 2. Payment for the material or services herein contracted for will be made in conformity with the provisions of article 1 and the specifications attached hereto and hereby made a part of this contract. They will be made on the proper certificate of the inspecting and receiving officer, showing delivery and acceptance, but from all such payments five per cent will be retained until final completion of the contract.

ARTICLE 3. The United States reserves the right to order additional supplies under this contract, not to exceed twenty (20) per cent in each case, of the quantities contracted for, at the same prices and to be delivered at the date or dates fixed by the contracting officer, under appropriations made at the date of this contract, or to accept, with consent of the contractor, at the same prices in full satisfaction of this contract such lesser quantities of the supplies herein contracted for, not less than eighty (80) per cent in each case, as in the opinion of the contracting officer shall best accord with the public interest. The provisions of this contract in regard to liquidated damages will apply to the delivery of any additional orders given under this article.

ARTICLE 4. All material furnished under this contract shall be at all times subject to inspection by the proper officers or agents of the Ordnance Department, United States Army; and whatever material furnished which does not in all respects fulfill the requirements of the contract shall be rejected, and the decision of the con-
45 tracting officer as to the quantity and quality of the material furnished shall be binding. The contractor will be required to replace all material so rejected.

ARTICLE 5. It is stipulated and agreed that the contracting officer may make changes in the drawings forming part of this contract, and if such changes involve extra labor and material, a fair price will be paid therefor; but if such changes involve less labor and material, a fair deduction will be made from the contract prices. No claim for addition or deduction on account of such changes will be made unless the same have been ordered in writing.

ARTICLE 6. In the event of the failure of the contractor to prosecute properly at any time the manufacture of the material herein

contracted for, or to complete the delivery at the date or dates stipulated in article 1 of this contract, the contracting officer or his successor may, with the approval of the Chief of Ordnance, U. S. Army, after notification in writing, proceed at the expense of the contractor to complete the manufacture or delivery of the material contracted for, or any part thereof, in such a manner as he may deem best for the interest of the public service, charging to the contractor any excess of cost over the contract price resulting from such action.

ARTICLE 7. In the event of the failure of the contractor to deliver the material herein contracted for at the rate or within the period in which delivery is due under the provisions of the specifications attached to and forming part of this contract and of article 1 above, the contracting officer, or his successor, in lieu of proceeding as provided for in article 6, may waive the time limit, and the contractor shall complete the delivery within a reasonable time, and there will be deducted as liquidated damages from any payment to be made thereafter $\frac{1}{10}$ of one (1) per cent of the contract price, for each and every day of delay in delivery beyond the date stipulated in article 1 for the completion of each delivery specified:

46 Provided, That when one or more component parts of a set or an article are not delivered by the proper date, the entire set or the complete article shall, when so required by the specifications, be classed and considered as undelivered material for the purpose of computing the liquidated damages. It is hereby mutually agreed and acknowledged that any deduction thus made is not imposed as a penalty but is a liquidation of the damages which according to a careful and reasonable estimate the United States would sustain if deprived of the use, as a public utility, of the material in question during the period for which deduction is made. In addition to the liquidated damages hereinbefore specified there shall also be deducted from any payments made the contractor, all additional expenses for inspection and superintendence incurred during any period for which liquidated damages are deducted. In making settlements in which such charges are involved the contractor shall receive credit for all delays which the contracting officer or his successor may determine to have been due to action of the United States, and for such other delays as the same authority may decide to have been due to such unavoidable causes, including first, unseasonably severe storms, and labor strikes in the works of the contractor, as occurred before the date or dates upon which delivery is due under the provisions of article 1, or before the expiration of the time thereafter for which credit is allowed under this article; and the date or dates of delivery shall be considered for the purpose of settlement as the date or dates of actual delivery less the delays for which credit has been allowed; but none of the above causes shall constitute a basis for action against the United States for damages: Provided further, That in the event of no deliveries being made on or before the date by which, under the provisions of this contract, all the material herein contracted for should be delivered, the contracting officer or his successor, in his discretion, with

the approval of the Chief of Ordnance, U. S. Army, may
47 terminate this contract, and in that event all costs of inspection or other expenses actually incurred by the United States under the contract up to and including the date of its termination will become a charge against the contractor immediately due and collectible.

ARTICLE 8. No person or persons shall be employed in the performan e of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

ARTICLE 9. The contractor agrees to hold and save the United States, and all persons acting under them, harmless from and against all liability on account of any patent right granted by the United States which may affect the material to be delivered under this contract.

ARTICLE 10. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee; but all rights of action for any breach of this contract by the contractor are reserved to the United States.

ARTICLE 11. No Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be, admitted to any share or part of this contract, or to any benefit that may arise herefrom, but, under the provisions of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109), this stipulation shall not apply, or be construed to apply, to any contract made with an incorporated company for its general benefit.

ARTICLE 12. If any doubts or disputes shall arise as to the meaning of anything in this contra t, the matter shall be referred to the Chief of Ordnance, United States Army, for determination. If, however, the contractor shall feel aggrieved at any decision of
48 the Chief of Ordnance, he shall have the right to submit the same to the Secretary of War, whose decision shall be final.

Article 13 stricken out prior to signing.

THE WYCKOFF PIPE & CREOSOTING CO.

Witnesses: Signatures:

REUBEN NIEDERHOFFE as to A. E. MITCHELL,
Vice President.

D. WILLETTS as to J. W. BENET,
Colonel, Ord. Dept., U. S. Army,
Contracting Officer.

(Executed in quintuplicate.)

49 II. *General Traverse. Entered Mch. 31, 1923*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *Argument and submission of case*

On May 19, 1924, this case was argued and submitted on merits by Mr. Harvey D. Jacob, for the plaintiff, and by Mr. Edward D. Hays, for the defendant.

50 IV. *Findings of fact and conclusion of law. Entered June 2, 1924*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

Plaintiff is a corporation incorporated and existing under the laws of the State of Connecticut, with its office at New York City, and on December 10, 1917, entered into a contract in writing with the United States whereby it agreed to furnish all labor and materials necessary to lay wood block floors in the structural shop, the machine shop, and the foundry, navy yard, Norfolk, Va., for the performance of which work the United States agreed to pay to the plaintiff the sum of $2.26 per square yard. A copy of the contract, together with the specifications and general provisions and also "addendum No. 1," attached and made a part of the petition, are made a part hereof by reference.

II

The contract provided that the plaintiff should complete its work in the structural shop within 30 calendar days from the date of copy of the contract was delivered to it. This was done on December 22, 1917, and accordingly the date for the completion of the contract was January 22, 1918.

The contract further provided that the work in the machine shop and in the foundry should be deferred until such time as the United States was ready to proceed, and that the work in the machine shop should be completed within 43 days and in the foundry within 8 days from the dates it began.

The contract further provided that the provisions of specification 2647 should be considered a part thereof. Specification 2647, in turn, referred to so-called "general provisions" as a part thereof.

Paragraph 6 of specification 2647 provided that the contractor should begin work in the structural shop as provided in paragraph 8 of the "general provisions," in the machine shop about April 1, 1918, and in the foundry about May 1, 1918. Paragraph 8 of the "general provisions" provided that the contractor should commence work immediately after the delivery to him of a copy of the contract unless otherwise directed by the Government.

51 III

The contract further provided that the wooden block flooring should be set in a concrete base to be laid by the Government. At the

time the contract was executed no delay was anticipated by the parties.

IV

The plaintiff immediately prepared itself to carry out the terms of the contract and was at all times ready, willing, and able to do so. The United States, however, did not furnish the concrete base for the flooring and prevented plaintiff from beginning the performance of its work until January 1, 1919, when work in the structural shop was started; until August, 1919, when work in the foundry was authorized; and until January and April, 1920, when work in the machine shop was authorized. All these delays were without the fault of the plaintiff and were occasioned solely by the defendant.

V

These delays compelled plaintiff to perform its contract at a time considerably later than originally agreed to by the terms of the contract, at which later time workmen's wages were increased, as well as the cost of material. This increased cost has not been paid to the plaintiff, except 50% of the estimated increase in labor cost in the plaintiff's plant, which was paid by the defendant in accordance with the provisions of addendum No. 1.

Because of these delays plaintiff was also put to the expense of paying renewal premiums upon its bonds, insurance upon material purchased for the performance of the contract, storage space for the material, increased freight rates, and in addition suffered loss by reason of the shrinkage of the lumber. Compensation for these items of damage has not been paid to plaintiff.

VI

On November 22, 1918, the acting public works officer notified the plaintiff that it was desired to increase the amount of wood block flooring provided for in the contract by an additional area in the foundry of approximately 22,000 square feet, and requesting that the plaintiff advise whether it was willing to perform this additional work at the price provided for in the contract. To this communication the plaintiff replied as follows:

NOVEMBER 25TH, 1918.

ACTING PUBLIC WORKS OFFICER,
U. S. Navy Yard, Norfolk, Virginia.

DEAR SIR: In answer to your favor of Nov. 22nd, File–C-2647-2-D, wherein you ask if we will increase contract #2647 by approximately 2,500 sq. yds.

We would like to advise with reference to this contract, which was placed approximately one year ago, that the prices of materials and the cost of labor have advanced to such an extent during the past year that we shall be very fortunate indeed if we break
52 even on this contract and the indications are that we shall perform the contract at a loss, this after taking into consideration

the fact that we are partially protected on the cost of the lumber which we purchased to a large extent before the advance and we understand that we are also 50 protected on the cost of labor, as it is our understanding that we shall be allowed to make claim against the Navy Department for one-half of the advance in the cost of labor since the date of the contract, and we understand that this proviso applies both to the labor of manufacturing the blocks at our Portsmouth factory, also to the labor of laying the blocks at the navy yard.

With regard to an extension of 2,500 sq. yds., or thereabouts, we should accordingly request a readjustment of the contract price to cover the advance in the costs of materials during the past year and the advance in the cost of labor.

We do not feel in a position to extend the contract at the old price, as we should certainly do so at a loss on account of the advance in costs just ment'oned.

If the additional quantity is advertised and awarded by public bidding, we shall attempt to quote so reasonably on the basis of changed conditions to guarantee that we shall be the low bidder or if the contract can be extended with an adjustment of price, we shall be glad to handle it in this way.

We have seriously cons'dered the possibility of making claim against the Navy Department for the loss which we are liable to meet with on the original contract as the time of completion of this work has been greatly delayed through reasons no fault of ours and the prices which showed us a reasonable profit, if the contract could have been performed on the date anticipated, are now the opposite of attractive. If we have any precedent for making claim for loss due to postponement other than a claim for one-half of the advance in the labor costs, we should be glad to have you advise us, in which case we might possibly do the entire work and make claim for the excess costs entering into the completion of both the old contract and the extension of the contract.

Very truly yours,

THE WYCKOFF PIPE & CREOSOTING COMPANY.

P. S.—With regard to what the new price would be after making adjustments for changes in costs, we are preparing figures on this and will be in a position to advise you further upon receipt of your reply to this letter.

W. P. & CREO. CO.

The public works officer thereupon requested the plaintiff to submit its revised figures for this additional work and said:

"Referring to your request for additional compensation on the original contract, there is at present no precedent for making claim for loss due to postponement of the work on any contract awarded after April 19, 1917. Your claim should, therefore, be taken up directly with the Bureau of Yards and Docks."

On December 10, 1918, the plaintiff wrote the public works officer offering to do the additional work of approximately 2,500 square

yards at the rate of $2.68 per square yard, and stated that: "This quotation covers what we have previously offered and are
53 under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917." Plaintiff further stated as justifying the increased price that the cost of lumber had increased $5.00 per thousand, the cost of creosote oil had increased 12½%, the cost of common labor had increased over 50%, the cost of freight and switching had increased 25%, the cost of sand had increased at the rate of 1 cent per square yard, and that increased items of overhead, together with reduced output due to decreased efficiency of labor had increased overhead to the estimated amount of 5 cents per square yard. On December 19, 1918, the plaintiff was informed that its submitted price of $2.68 per square yard appeared to the public works officer to be reasonable, it was thereafter approved by a board whose duty it was to report the cost of additional work, the public works officer extended the time for the performance of this work by reason of the increased quantity to the amount of 22 days, and on December 23 the plaintiff formally accepted this addition to the contract at the price stated.

Plaintiff was thereafter notified to proceed with the installation of the floor in the structural shop on January 1, 1919.

On January 30, 1919, the plaintiff reported progress to that date and informed the officer in charge that it would have a claim for extras by reason of the long unanticipated delay and requesting to be informed whether or not because of the uncertainty of the amount of additional expense to which it had been subjected it might defer presenting its claim until the completion of the contract "without prejudice to us in view of section 18 of the general provisions."

Under date of February 25, 1919, the plaintiff company stated to the acting public works officer the items of its proposed claim, as follows:

"1. Extra labor for manufacturing and laying the paving blocks on account of the advance in the scale of wages, between November 3rd, 1917, and the date when the labor was performed.

"2. Extra expense occasioned by the long and unanticipated and unwarranted delay in ordering the work to proceed since the date of the contract, which was December 10th, 1917, including—

"(*a*) Renewal premiums on the surety company contract bond.

"(*b*) Additional freight rates on sand and other materials.

"(*c*) Additional cost of sand due to the fact that the Government commandeered the sand during the interval between the date of and performance of our contract and the party with whom we contracted for sand furnished same through Government channels at increased cost.

"(*d*) Additional quantities of expansion joints required, owing to the changes in the structural shop plans.

"(*e*) Additional cost of creosote oil.

"(*f*) Storage, insurance, and carrying charges on a large stock of lumber purchased for the account of your contract and carried on our yard for a space of between one and two years.

"Without passing on these claims, will you kindly acknowledge receipt of this letter and advise that we will not be prevented from urging them by reason of section 18 of the general provisions placing a limit of 60 days on the making of such claims."

54 The public works officer acknowledged receipt of that communication and stated that "the justice of the main contention in these claims is recognized, and on account of the fact that the delay, caused in your contract by the installation of the floor, performed by the Government, making the amount of claim uncertain at the present time, it will be satisfactory for you to make this claim for a definite amount in detail upon the completion of your work." This additional work in the structural shop was performed by the plaintiff together with that called for by the original contract, and for such additional work the plaintiff was paid at the rate of $2.68 per square yard. The contract work in the structural shop was begun and for the most part performed in January, 1919.

VII

In January, 1919, the plaintiff was notified to also lay additional flooring in the foundry and the price of $2.68 per square yard, just theretofore determined to be a reasonable price for additional work in the structural shop was regarded as applicable also to additional work in the foundry. Plaintiff was not permitted to proceed at once either with the additional or the contract work to be done in the foundry, and was not given an opportunity to do that work until in the month of August, 1919. Meanwhile the cost of labor and materials had continued to advance.

VIII

Thereafter, in February, 1920, plaintiff was requested to also lay additional flooring in the machine shop and in connection therewith it submitted its estimate as to the proper cost of such additional work at $3.28 per square yard, which estimate, submitted by items, was approved by the committee charged with the duty of investigating such matters, and for such additional work done at or about the same time that the contract work in the machine shop was performed and in connection therewith, the plaintiff was paid at said rate of $3.28 per square yard. This and the contract work in the machine shop was done in the months of January and April, 1920. It was promptly performed as soon as the machine shop was ready therefor.

IX

The record does not disclose by items the amount of extra expense incurred by the plaintiff by reason of the lengthy delay in the performance of the work.

X

Three hundred ninety-one thousand nine hundred forty-seven (391,947) feet of lumber were required for flooring the structural

shop, the foundry, and the machine shop, according to the yardage called for in the original contract. The lumber was bought by plaintiff about the time the contract was made. One hundred fourteen thousand two hundred sixty-eight (114,268) feet of lumber were required for the extra flooring in the foundry ordered
55 in January, 1919. The increase in the prevailing market price of lumber from the time the same was bought by plaintiff until it was actually used in the different flooring jobs was $6 021.23.

The total quantity of creosote oil used in laying the floor yardage called for in the three jobs of the original contract, plus the extra yardage required in the foundry, was fifty-two thousand eight hundred seventy-seven (52,877) gallons; and the market price increase thereof from the time the original work was contracted for, and from the time the extra foundry yardage was ordered, until the same was actually used in laying the floors was $712.59.

Such price increase in the lumber, $6,021.23, and in the creosote oil, $712.59, totaling $6,733.82, occurred after the same was purchased by plaintiff pursuant to contract requirement.

XI

The reasonable value of the contract work in the structural shop at the time that it was performed in January, 1919, was $2.68 per square yard. The reasonable value of the contract work in the foundry, which the plaintiff was not permitted to perform until August, 1919, was at that time $2.98 per square yard. The reasonable value of the contract work in the machine shop which the plaintiff was not permitted to perform until January and April, 1920, was $3.28 per square yard.

The reasonable value of the flooring provided for in the original contract, at the times it was permitted to be laid, based on prices determined by governmental authority at about these times to be reasonable prices for the laying of additional flooring of the same kind, was $9,936.54 in excess of the amount plaintiff was paid therefor.

XII

On January 29, 1920, the plaintiff entered into another contract with the United States to furnish to the Watervliet Arsenal, New York, 280,000 wooden creosoted blocks, to be delivered at the rate of 70,000 blocks per week, beginning February 28, 1920, the number of said blocks being thereafter reduced to 275,000. A copy of said contract is attached to plaintiff's petition, marked "Exhibit C," and is made a part hereof by reference.

XIII

The blocks were not delivered within the time prescribed by the contract, but were delivered at various dates from March 31, 1920,

to September 1, 1920. The delay in delivery was partially due to interference with transportation facilities between the source of supply of the raw material and plaintiff's plant, and otherwise to freight embargoes preventing prompt delivery from plaintiff's plant to the arsenal. In some instances the railroads accepted the blocks at the plaintiff's plant but did not promptly deliver them, and in other instances, because of embargoes then in force, the railroad companies refused to accept consignments. The plaintiff was without fault as to the delays.

56 XIV

Plaintiff was paid for said blocks in nine separate payments. From the first four of these payments no deduction was made of liquidated damages on account of delay, the contracting officer treating such delays as on "account of an embargo placed by transportation companies on all freight shipments and the congested conditions of freight transportation," as noted on the face of each voucher. The contracting officer deemed such delays to be excusable delays for which the plaintiff, under the provisions of the contract, was not to be charged with liquidated damages. Thereafter the accounting officers, in examining the vouchers for these four payments thus made, determined that the delays were not excusable under the contract and charged back as against the contracting officer the total sum of $186.45, which it was held the contracting officer should have deducted from these vouchers as liquidated damages.

The contracting officer reported to the plaintiff the action of the accounting officers in charging back this sum against him, and represented that if the plaintiff would not reimburse him by refunding him that amount he must personally sustain the loss, and thereupon the plaintiff, under protest refunded such sum of $186.45.

From the remaining five payments made to the plaintiff there was deducted the aggregate sum of $334.80 as liquidated damages for delay in deliveries.

CONCLUSION OF LAW

Upon the facts found the court concludes that the plaintiff is entitled to recover the sum of $9,936.54 (Finding XI), and the further sum of $186.45 (Finding XIV), in all the sum of $10,122.99.

It is therefore considered and adjudged that plaintiff have judgment against the United States in the sum of ten thousand one hundred twenty-two dollars and ninety-nine cents ($10,122.99).

57 V. *Judgment*

At a Court of Claims held in the city of Washington on the 2nd day of June, A. D. 1924, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the plaintiff, and do order and adjudge that the plaintiff, as afore-

said, is entitled to recover and shall have and recover of and from the United States the sum of ten thousand one hundred and twenty-two dollars and ninety-nine cents ($10,122.99).

BY THE COURT.

VI. *Proceedings after entry of judgment*

On July 21, 1924, the defendant filed a motion to amend the findings of fact and conclusion of law; to set aside the judgment for plaintiff; and to grant the defendant a new trial.

VII. *Order overruling motion for new trial, October 20, 1924*

It is ordered by the court this 20th day of October, 1924, that the defendant's motion for new trial be and the same is overruled.

58 VIII. *Petition for appeal. Filed December 16, 1924*

From the judgment rendered in the above-entitled cause on the 20th day of October, 1924, in favor of the claimant, the defendants, by their Attorney General, on the 16th day of December, 1924, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

IX. *Order allowing appeal*

It is ordered by the court this 12th day of January, 1925, that the defendant's application for appeal be and the same is allowed.

59 In Court of Claims

[Title omitted.]

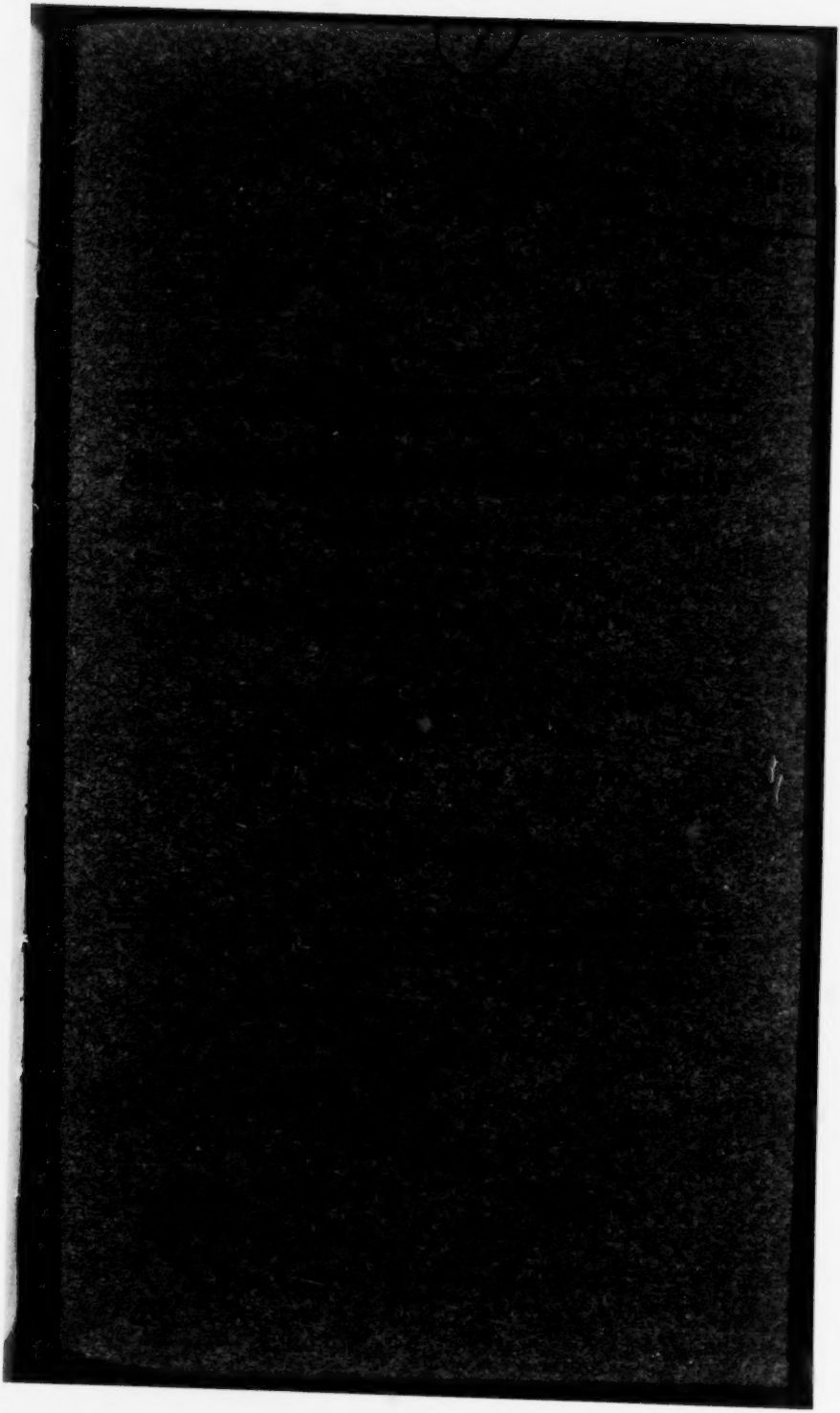
I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the proceedings after the entry of judgment; of the defendant's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 20th day of January, A. D. 1925.

[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

[Indorsed on wrapper:] File No. 30,876. Court of Claims. Term No. 911. The United States, appellant, vs. Wyckoff Pipe & Creosoting Co., Inc. Filed February 17th, 1925. File No. 30,876.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1925



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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 282

THE UNITED STATES, APPELLANT
v.
WYCKOFF PIPE & CREOSOTING CO., INC.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims wrote no opinion in this case, and the case is listed in 59 Ct. Cls. 980 as one of the judgments rendered by the court without opinion.

JURISDICTION

The judgment to be reviewed was entered on June 2, 1924. (R. 37.) A motion for new trial was then seasonably made and overruled by the court below on October 20, 1924 (R. 38), and a petition for an appeal was duly filed on December

16, 1924, and allowed on January 12, 1925 (R. 38), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 941).

THE QUESTION

The United States made a contract with appellee for the laying of a creosoted wood-block floor in certain navy yard buildings. The work was delayed through the failure of the United States to perform its undertakings, and recovery was had against the United States for the breach.

The sole question presented relates to the measure of damages.

The Court of Claims allowed recovery for the reasonable value of the work when it was performed less what had already been paid. The United States contends the recovery should have been limited to the loss and damage suffered as a result of the delay.

STATEMENT OF FACTS

The amount involved in this case is small and possibly it does not deserve the attention of this Court. The appeal, however, was taken more than a year ago; interest on the judgment would have to be paid if it is dismissed; a palpable error was committed by the trial court, which may be repeated in other cases if not corrected, so we have concluded to submit the case.

The appellee is a Connecticut corporation, and on December 10, 1917, entered into a contract in writing with the Government whereby appellee agreed to furnish all labor and material necessary to lay wood-block floors in the structural shop, the machine shop, and the foundry at the navy yard in Norfolk, Virginia. (R. 31.)

The contract provided that the wooden-block flooring should be laid in a concrete base which was to be prepared by the Government (R. 31), and the court found as a fact that at the time the contract was executed no delay was anticipated by the parties (R. 32). The court below found that the Government did not furnish the concrete base and prevented appellee from beginning work in the structural shop until January 1, 1919, in the foundry until August, 1919, and in the machine shop until January and April, 1920; that all such delays were without fault of appellee (R. 32); that the cost of labor had materially increased, and appellee had paid renewal premiums upon bonds, insurance upon material purchased, storage costs upon such material, increased freight rates, and suffered loss by shrinkage of the lumber, none of which loss had been paid to appellee, except fifty per cent of the increased labor cost (R. 32).

In November, 1918, the Government desired to increase the amount of flooring, and requested appellee to advise whether it was willing to perform this additional work at the contract price. Ap-

pellee replied that the costs had advanced (R. 32, 33)—

> to such an extent during the past year that we shall be very fortunate indeed if we break even on this contract and the indications are that we shall perform the contract at a loss, this after taking into consideration the fact that we are partially protected on the cost of the lumber which we purchased to a large extent before the advance and we understand that we are also 50 protected on the cost of labor, as it is our understanding that we shall be allowed to make claim against the Navy Department for one-half of the advance in the cost of labor since the date of the contract, * * *

The letter of appellee then stated that (R. 33)—

> With regard to an extension of 2,500 sq. yds. or thereabouts, we should accordingly request a readjustment of the contract price to cover the advance in the costs of materials during the past year and the advance in the cost of labor.

The letter also stated that (R. 33)—

> We (appellee) have seriously considered the possibility of making claim against the Navy Department for the loss which we are liable to meet with on the original contract as the time of completion of this work has been greatly delayed through reasons no fault of ours and the prices which showed us a reasonable profit, if the contract could have been performed on the date antici-

> pated, are now the opposite of attractive. If we have any precedent for making claim for loss due to postponement other than a claim for one-half of the advance in the labor costs, we should be glad to have you advise us, in which case we might possibly do the entire work and make claim for the excess costs entering into the completion of both the old contract and the extension of the contract.

The Government replied, requesting appellee to "submit its revised figures for this additional work" (R. 33), and stated that with reference to appellee's request for additional compensation on the original contract there was no precedent for making claim, and that therefore the claim should be taken up directly with the Bureau of Yards and Docks. (R. 33.) In December, 1918, appellee offered to do the additional work at $2.68 per square yard, and stated that (R. 34)—

> This quotation covers what we have previously offered and are under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917.

This meant, of course, that under the contract for additional work quoted at $2.68 per square yard the same items of labor and material would be furnished per yard as were to be furnished under the original contract at $2.26 per yard. Appellee stated the basis of the calculation of this price, and on December 19, 1918, was informed

that its submitted price of $2.68 appeared to the Public Works Officer to be reasonable, and this price was thereafter approved by a board " whose duty it was to report the cost of additional work," and the time of appellee was extended because of the additional work, and on December 23, 1918, appellee " formally accepted this addition to the contract at the price stated." (R. 34.) Appellee was notified to proceed with the work in the structural shop on January 1, 1919, and on January 30, 1919, appellee reported progress to that date and informed the officer in charge that (R. 34)—

> it would have a claim for extras by reason of the long unanticipated delay and requesting to be informed whether or not because of the uncertainty of the amount of additional expense to which it had been subjected it might defer presenting its claim until the completion of the contract " without prejudice to us in view of section 18 of the general provisions."

On February 25, 1919, appellee stated to the Public Works Officer the items of its proposed claim as follows (R. 34, 35)—

> 1. Extra labor for manufacturing and laying the paving blocks on account of the advance in the scale of wages, between November 3rd, 1917, and the date when the labor was performed.
>
> 2. Extra expense occasioned by the long and unanticipated and unwarranted delay in ordering the work to proceed since the

date of the contract, which was December 10th, 1917, including—

(*a*) Renewal premiums on the surety company contract bond.

(*b*) Additional freight rates on sand and other materials.

(*c*) Additional cost of sand due to the fact that the Government commandeered the sand during the interval between the date of and performance of our contract and the party with whom we contracted for sand furnished same through Government channels at increased cost.

(*d*) Additional quantities of expansion joints required, owing to the changes in the structural shop plans.

(*e*) Additional cost of creosote oil.

(*f*) Storage, insurance, and carrying charges on a large stock of lumber purchased for the account of your contract and carried on our yard for a space of between one and two years.

Without passing on these claims, will you kindly acknowledge receipt of this letter and advise that we will not be prevented from urging them by reason of section 18 of the general provisions placing a limit of 60 days on the making of such claims.

The Public Works Officer acknowledged the receipt of this communication and stated that (R. 35)—

the justice of the main contention in these claims is recognized, and on account of the fact that the delay, caused in your contract

> by the installation of the floor, performed by the Government, making the amount of claim uncertain at the present time, it will be satisfactory for you to make this claim for a definite amount in detail upon the completion of your work.

The original work and the additional work in the structural shop was all done about the same time, and for the additional work appellee was paid $2.68 per square yard. (R. 35.)

In January, 1919, the Government notified appellee to do additional work in the foundry, and the price of $2.68 per square yard was regarded as applicable to such additional work. Appellee, however, was not permitted to proceed with the original or the additional work in the foundry until August, 1919, and in the meantime the costs had increased. (R. 35.) In February, 1920, appellee was requested to lay the additional flooring of the machine shop, and it submitted a price of $3.28 per square yard, which price was approved by the committee in charge, and the original contract work and the additional work in the machine shop was done in January and April, 1920, and appellee was paid $3.28 per square yard for the additional work. (R. 35.)

> *The record does not disclose by items the amount of extra expense incurred by the plaintiff by reason of the lengthy delay in the performance of the work.* (R. 35.) (Italics ours.)

The Court of Claims then found that lumber, which was purchased for the performance of the contract, increased in value while on hand during the time of delay in the sum of $6,021.23. The findings also show that the market price of the creosote oil purchased for the original contract work and the additional work in the foundry had increased after it was purchased to the extent of $712.59. (R. 36.) It then found that the *reasonable value* (not cost) of this flooring at the time it was actually laid was $9,936.54 in excess of the amount paid to appellee. (R. 36.)

The findings then proceed to discuss another item growing out of another contract for which the court rendered judgment of $186.45, which we do not question in this Court.

The court rendered judgment for said sum of $9,936.54, being the difference between the reasonable value of the work and the amount appellee was paid, together with the sum of $186.45 above mentioned, or a total of $10,122.99. (R. 37.)

The United States made in this Court a motion to remand for additional findings. This motion is not now pressed, as the error complained of seems clear from the findings as they stand.

SPECIFICATION OF ERRORS TO BE URGED

The court erred in awarding the reasonable value of the work at the time it was done less the amount which had been paid, thus disregarding the contracts and contract prices and allowing the con-

tractor the benefit of increase in value of materials previously purchased for this work, instead of the carrying charges, and erred in not limiting the recovery of damages to the loss and expense suffered by the contractor as a result of the delay.

SUMMARY OF ARGUMENT

The proper measure of damages for the delay caused by the United States was the additional cost to the contractor resulting from the delay.

The trial court erred in allowing the contractor to recover the reasonable value of the work at the time it was performed, less what had been paid. This disregarded entirely the contracts and the contract prices and allowed recovery on a *quantum meruit*. It also had the effect of allowing to the contractor the increase in value of materials purchased and kept on hand for the performance of the contract. For damage on account of such materials there should have been allowed only the insurance, storage, and carrying charges during the period of delay. There are no findings by which recovery under the correct rule of law may be computed.

ARGUMENT

THE COURT OF CLAIMS ADOPTED A WRONG MEASURE OF DAMAGES

The lower court found that "the reasonable value of the flooring provided for in the original contract, at the times it was permitted to be laid, * * * was $9,936.54 in excess of the amount

plaintiff was paid therefor." (Finding XI, R. 36.) Recovery was allowed for that amount (plus an item of $186.45 not here in dispute). (Conclusion of Law, R. 37.)

It is clear, therefore, that the court allowed recovery of the reasonable value of the work at the time it was done less the amount paid. This would not necessarily have produced an erroneous result if the contractor had purchased his material at the prices prevailing when the work was performed, and if the profit included in the " reasonable value " was the same as had been figured in the contract prices, as substantially the same result might thus have been obtained as if the correct measure of damage had been applied. The findings affirmatively show, however, that in anticipation of the performance of the work the contractor had purchased the lumber for the flooring and the creosote oil and kept them on hand until the work was performed, and that the increase in value of the lumber and oil *between the time they were purchased and the time they were used in the work* was $6,733.82. (R. 36.) It is clear that the court gave the contractor in the allowance of damages for delay $6,733.82, which represented the increase in value, after purchase, of materials on hand for the work. This was obviously an error. The correct measure of damage for the delay was the loss actually sustained by the contractor as the result of delay. *United States* v. *Smith,* 94 U. S. 214; *United States* v. *Mueller,* 113 U. S. 153;

United States v. *Barlow*, 184 U. S. 123; *Ripley* v *United States*, 223 U. S. 695.

While in the cases cited the Government did not delay the contractor in the *commencement* of the work, the Government did cause the *suspension* of and *interference* with such work after it was started. These defaults of the Government, i. e., delaying and suspending or interfering with the contractors' undertakings, are so similar as to require the application of the same measure of damages. The *Smith case* involved the liability of the United States by reason of its improper suspension of the work of the contractor who had agreed to supply the skilled labor and the materials necessary for the erection of certain buildings for its use. With respect to the question of damages the Court said (pp. 218-219):

> The United States can be required to make compensation to a contractor for damages which he has actually sustained by their default in the performance of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States.

If the contractor was diligent enough to purchase his materials early, his loss on account thereof, resulting from the delay, was merely the cost of carrying the material. Indeed, that is the basis on which the claim was originally made and damages

claimed, because in it appears the item " storage, insurance, and carrying charges on a large stock of lumber purchased for the account of your contract and carried on our yard for a space of between one and two years." (R. 34.)

The allowance by the court of $9,936.54 as the difference between the amount which had been paid and the reasonable *value* (not cost) of the work when done, gave the contractor the benefit of the rise in value, after purchase, of the material purchased for the contract, amounting to $6,733.82. It was the extra cost resulting from the delay, not the value of the work, which should have been considered, and the item of $6,733.82 should have been left out, and in its place the contractor should have been allowed the insurance, storage, and carrying charges of the material purchased and held for the work. It has been shown that the court's error went beyond a mere mistake in respect to damages, and amounted to a complete disregard of the contract prices agreed on, and allowed recovery on *quantum meruit* for the work.

The findings, therefore, do not sustain the judgment. There are no findings which enable the ascertainment of damages by any proper rule. The Court of Claims found that the record before it did not show what the extra expense was. (Finding IX, R. 35.)

The appellee seeks to avoid this situation by the contention (urged for the first time in opposition

to the Government's motion for a new trial) that it made a new contract with the United States for the work covered by the original contract. The findings conclusively show that three new contracts were made for *additional* work at a higher price, but the work originally contracted for, as well as that covered by the supplemental contracts, was performed under the contracts with the understanding a claim would later be made for damages caused by the delay of the United States. The petition filed in the Court of Claims proceeded on the same theory (R. 2, par. 6) and pleaded in substance the doing of the work under the contract subject to the right to recover, in addition to the contract price, the increased cost resulting from the delay.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Court of Claims must be reversed and that the case should be remanded for further proceedings in that court.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

MARCH, 1926.

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
WYCKOFF PIPE & CREOSOTING COMPANY, INC. | No. 911

APPEAL FROM THE COURT OF CLAIMS

MOTION TO REMAND TO THE COURT OF CLAIMS FOR FURTHER FINDINGS OF FACT

The appellant herein, the United States, by its Solicitor General, respectfully represents to this honorable court, as follows:

(1) Plaintiff's petition is in two counts. This motion and the statements herein have application to the first count alone. Said count is based on a contract between plaintiff and defendant dated December 10, 1917, whereby plaintiff undertook to lay wood-block floors in three separate buildings connected with the U. S. Navy Yard at Norfolk, Va., said buildings being a structural shop, a machine shop, and a foundry.

(2) The Government failed to have either of the three buildings ready to receive its floor until long

the contract work in the foundry, which the plaintiff was not permitted to perform until August, 1919, was at that time $2.98 per square yard. The reasonable value of the contract work in the machine shop which the plaintiff was not permitted to perform until January and April, 1920, was $2.28 per square yard.

The reasonable value of the flooring provided for in the original contract, at the times it was permitted to be laid, based on prices determined by governmental authority at about these times to be reasonable prices for the laying of additional flooring of the same kind, was $9,936.54 in excess of the amount plaintiff was paid therefor.

(7) The court did not make any finding as to whether or not the said sum of $6,733.82, set out in Finding No. X, as the market-price increase in the lumber and creosote oil after the same was purchased by plaintiff pursuant to contract requirement, was included in the sum of $9,936.54, set out in Finding No. XI, as the excess of the reasonable value of the flooring provided for in the original contract over the amount plaintiff was paid therefor.

(8) On June 2, 1924, the Court of Claims rendered judgment for plaintiff on the first count of its petition, pursuant to Finding No. XI, in the sum of $9,936.54.

(9) Thereafter, on July 21, 1924, defendant filed its motion to amend the findings of fact and con-

clusion of law, and to set aside the judgment, and for a new trial, a true copy of said motion being hereto annexed and marked Exhibit A, and in said motion defendant requested the court to amend Finding of Fact No. XI by adding at the end thereof a new paragraph in the following words:

> The items creating such excess of $9,936.54 in the reasonable value of the flooring include the item of $6,733.82 set out in Finding No. X as the market price increase of wood blocks and creosote oil after the same had been purchased by plaintiff pursuant to contract requirement. The actual increase in cost to plaintiff of laying the wood block floors, in excess of what such cost would have been if no delay had been caused by the Government in the performance of such work, was $3,202.72.

(10) Thereafter, on October 20, 1924, the court overruled said motion.

(11) Thereafter, on January 12, 1925, pursuant to application therefor by defendant, an appeal was granted from said court to the Supreme Court of the United States.

(12) Thereafter, on January 20, 1925, the clerk of the Court of Claims certified under seal a transcript of the record in said cause pursuant to the rulings of the Supreme Court regulating appeals from the Court of Claims.

(13) Thereafter, on January 26, 1925, defendant filed its motion in the Court of Claims to re-

quire the clerk of said court to incorporate in the appeal transcript its motion filed July 21, 1924, for amended findings of fact and for a new trial, a true copy of said motion being hereto annexed and marked "Exhibit B"; and, upon consideration of said motion the Court of Claims indorsed thereon the following order:

> The clerk will make up the record on appeal in this case in conformity with the rules of the Supreme Court regulating appeals from this court.

(14) Defendant asserts that the findings of fact as made by the Court of Claims are ambiguous, vague, and obscure and do not advise the Supreme Court as to whether or not said sum of $6,733.82, representing price increase in lumber and creosote oil held on hand by plaintiff, is included in the judgment rendered by the Court of Claims.

(15) Defendant contends that the market price increase of the lumber and creosote oil during the period they were held on hand by plaintiff for use under the contract, was not an item of expense to plaintiff and did not cause plaintiff any financial loss, and that, therefore, the Government is not liable to plaintiff for said theoretical market price increase.

Wherefore, the appellant moves this court to remand the cause to the Court of Claims and to direct said court to find:

Whether or not the items creating such excess of $9,936.54 in the reasonable value of the flooring

include the item of $6,733.82 set out in Finding No. X as the market price increase of wood blocks and creosote oil after the same had been purchased by plaintiff pursuant to contract requirement.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

MARCH, 1925.

EXHIBIT A

In the Court of Claims of the United States

WYCKOFF PIPE & CREOSOTING COMPANY, INC., plaintiff, *v.* THE UNITED STATES, DEFENDANT	No. C–19

DEFENDANT'S MOTION TO AMEND THE FINDINGS OF FACT AND THE CONCLUSION OF LAW FILED HEREIN BY THE COURT; TO SET ASIDE THE JUDGMENT FOR PLAINTIFF RENDERED ON JUNE 2, 1924, FOR $10,122.99; AND TO GRANT THE DEFENDANT A NEW TRIAL

Now comes the United States, by its Attorney General, believing the Court has erred in its findings of fact and in its conclusion of law in the above-entitled cause, and moves the Court to amend its findings of fact filed herein on June 2, 1924, by making additional findings of material facts; to vacate and set aside the judgment rendered in favor of plaintiff on said date in the sum of $10,122.99; to grant defendant a new trial on such amended findings of fact; and thereupon render judgment in accordance with such amended findings of fact.

And defendant therefore respectfully requests:

I

That the Court will amend Finding of Fact No. XI by adding at the end thereof a new paragraph in the following words:

> The items creating such excess of $9,936.54 in the reasonable value of the flooring include the item of $6,733.82 set out in Finding No. X as the market price increase of wood blocks and creosote oil after the same had been purchased by plaintiff pursuant to contract requirement. The actual increase in cost to plaintiff of laying the wood block floors, in excess of what such cost would have been if no delay had been caused by the Government in the performance of such work, was $3,202.74.

In support of this request defendant invites the attention of the Court to the testimony of witness O. Wendell Hill, for the plaintiff, cross-questions 156 to 166, record pages 63 and 64. This evidence is supported by the testimony of witness John B. Miles, for defendant, question 47, record page 117, and question 54, record page 118. The evidence of these two witnesses conclusively proves that plaintiff bought a quantity of wood blocks and creosote oil for use under the contract immediately after the contract was signed. This material was kept on hand several months by plaintiff and was eventually used in doing the contract work. The market price increase on that quantity of like material during the period it was held on hand amounted to $6,733.82. Such market price increase, so far as the plaintiff was concerned, was only theoretical because the material was on hand and paid for before the price went up, and such increase did not add any cost whatever to the performance of the work by plaintiff.

II

That the Court will amend Finding of Fact No. XIV by adding at the end thereof a new paragraph in the following words:

> The nine deliveries of blocks, to which said nine separate payments applied, were all delayed without fault of the Government. None of said delays in delivery proceeded from any such causes enumerated in the contract as would operate to relieve plaintiff from the liability for liquidated damages as prescribed in said contract. The sum of $521.25 is now retained by the Government as liquidated damages on account of said nine delayed deliveries of blocks; and said sum represents one-thirtieth (1/30) of one (1) per cent of the contract price of such blocks for each and every day of delay in the delivery thereof beyond the stipulated date of delivery.

In support of this request defendant invites the attention of the Court to the testimony of witness O. Wendell Hill, for the plaintiff, cross-questions 138 and 139, record page 61. This evidence admits the delays in delivery of all of the nine (9) shipments in question. Nowhere in the record is there any evidence showing that such delays proceeded from any causes enumerated in the contract as justifying delay, nor from any such causes as would excuse plaintiff from the liability for liquidated damages.

III

That the Court will modify its conclusion of law in accordance with such amended findings of fact.

Respectfully submitted.

ROBERT H. LOVETT,
Assistant Attorney General.
EDW. D. HAYS,
Special Assistant to the Attorney General.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT AND FOR A NEW TRIAL

I

DEFENDANT RESPECTFULLY MAINTAINS THAT THE COURT ERRED IN RECOGNIZING THE MARKET-PRICE INCREASE OF MATERIALS AS AN ELEMENT OF DAMAGE WHEN SUCH MATERIALS WERE PURCHASED BY THE PLAINTIFF FOR USE UNDER THE CONTRACT BEFORE SUCH MARKET-PRICE INCREASE OCCURRED. THE PLAINTIFF WAS NOT IN ANY WISE AFFECTED BY SUCH INCREASE IN THE OUTSIDE MARKET

In Finding No. X the Court found, in substance: That plaintiff purchased a certain quantity of wood blocks and creosote oil for laying the floors contemplated in the contract; that said material was bought shortly after the contract was made and for uses under the contrct; and thereafter, and before these materials were actually used, the market price of that quantity of the same kind of materials had advanced $6,733.82.

In Finding No. XI the Court found, in substance: That plaintiff was delayed through fault of the Government for several months in laying the

wood-block floors contemplated in the original contract; that during such period of delay the reasonable value of such work increased $9,936.54 in excess of the amount paid plaintiff therefor.

From all the evidence in the record it is apparent that the Court, in determining the difference between the reasonable value of the work when it was done and the contract price paid for such work, included the theoretical price increase of materials on hand ($6,733.82) in the *reasonable value* increase of $9,936.54. Request No. 1 in defendant's motion, therefore, seeks to eliminate said sum of $6,733.82 from the finding of $9,936.54, as the increase in reasonable value of the contract work.

Plaintiff in its petition does not treat the contract in question as abandoned by the parties thereto; and it does not ask for compensation based on the theory of a new contract fixing a price for the original work. The suit is based on the original contract, and the declaration of damage for which plaintiff asks recovery is summed up in the concluding paragraph of the first count of the petition in the following words: *The total increased cost of the work in the three shops occasioned solely by defendant.*

The actual outlay of plaintiff for extra items of expense not anticipated when the contract was made, and independent of the theoretical market price increase of materials it held on hand under the contract, even under the most liberal interpretation of the evidence, was never estimated by plaintiff at a greater sum than $3,476.14. (See Record, p. 63, q. 156.)

When the Government got ready to release to plaintiff for floor laying the three separate jobs contemplated in the original contract, which it did on

three separate dates some months apart, it was apparent that the cost to plaintiff of doing this work would be greater than such cost would have been if the work could have been performed directly after the contract was let. It will be assumed, as to each of the three floors, that defendant's delay was responsible for such cost increase to plaintiff.

Then, at the time when any of the three floors were released to plaintiff, the law held out to plaintiff two separate remedies, namely, (1) Plaintiff could have rescinded the contract and brought suit for the breach; or, (2) Plaintiff could have resumed the work and sued for *actual damages* caused by the suspension. (See *Figh* v. *United States,* 8 C. Cls. 319; also 13 C. J. 613 to 615.)

Plaintiff did not elect to rescind. On the other hand, plaintiff and defendant agreed that the work would go on to completion and that plaintiff might retain its right to set up a claim for actual damages (*extra expense incurred*) when a detailed statement of the same could be furnished upon the completion of the work. (See Finding No. VI.)

Plaintiff on February 25, 1919, in a statement to the Public Works officer scheduled its prospective claim, in substance, as follows: 1. Extra labor cost; 2. Extra expense, including (*a*) additional bond premiums, (*b*) additional freight rates, (*c*) additional cost of sand, (d) additional quantities of expansion joints, (*e*) additional cost of creosote oil, and, (*f*) storage, insurance, and carrying charges. It added this statement: " Without passing on these claims, will you kindly acknowledge receipt of this letter and advise that we will not be prevented from urging them by reason of section 18 of the General Provisions placing a limit of sixty days on the making

of such claims." The Public Works officer acknowledged the receipt of this communication, and his statement includes the following words: "it will be satisfactory for you to make this claim for a definite amount in detail upon the completion of your work." All of this appears in detail in the Court's Finding No. VI. Thereupon plaintiff proceeded with its performance on the definite understanding that it was to receive the stipulated contract price for laying the three floors contemplated in the original contract, and that there was reserved to plaintiff for settlement at the conclusion of the work a claim for additional compensation *to the amount of the extra expense incurred.* It has already been paid the contract price for the three original floors and has also been paid one-half (½) of the extra labor expense. Its sole remaining right is to recover the unpaid additional expense actually incurred in laying the three floors in question. This limitation is put on the plaintiff not only by the law applicable to the case but by its specific understanding with the Public Works officer.

In the case of *Figh* v. *United States,* 8 Ct. Cls. 319, the substance of the Court's decision in a similar case is set out in the following syllabi:

> I. Where the Government suspends work done under a contract so as to prevent the contractors from performing their part of the contract according to its terms, they may treat it as rescinded and sue for the breach, or they may complete the work after the Government determines that it shall be resumed, and then sue for their *actual damages* caused by the suspension; and this

though they have received the full consideration of the contract.

II. Where the Government suspends work under a contract, and the contractors comply with the Government's request, both in suspending work and in subsequently resuming it, they may recover all their *actual damages occasioned by the suspension,* including loss occasioned by the nonemployment of their hands, by an advance of wages, and by the loss of lumber washed away and stolen. [Italics ours.]

In the case of *United States* v. *Smith,* 94 U. S. 214, the Court at pages 217 and 218, in discussing a case very similar to the one at bar, said:

> Here the work was stopped by order of the United States. Smith asked to be released from his contract, unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, certainly, this would be considered an improper interference, and damages would be awarded *to the extent of the loss which was the necessary consequence of the suspension.* The United States must answer according to the same rule. [Italics ours.]

The evidence in this case conclusively proves that plaintiff sustained no financial outlay whatever by reason of the market price advance on the materials it held on hand during said period of advance, having purchased them before the rise in price began. Such price increase, as it applied to the materials on hand, was only theoretical so far as plaintiff

was concerned, because plaintiff sustained no expense whatever on account thereof.

From the evidence adduced herein, and from the findings of fact filed by the Court, it is apparent that the lesser sum ($6,733.82) set out in Finding No. X was wrapped up and included within the larger sum ($9,936.54) set out by the Court in Finding No. XI. It is the view of defendant that said sum of $6,733.82, representing the market price increase of materials on hand, added nothing to the expense of plaintiff and is not an allowable element of damage, and that the judgment rendered herein should be reduced by that amount.

II

WHETHER PLAINTIFF IS LIABLE FOR LIQUIDATED DAMAGES OR NOT DEPENDS, NOT UPON THE CONCLUSIONS OF THE CONTRACTING OFFICER, BUT UPON THE FACTS OF DELAY AND THE TERMS OF THE CONTRACT ITSELF

The second count in plaintiff's petition deals with a contract dated January 29, 1920, whereby plaintiff undertook to deliver a quantity of wood blocks to defendant at Watervliet Arsenal. The contract provided for liquidated damages at the rate of one-thirtieth ($\frac{1}{30}$) of one per cent (1%) of the contract price for each and every day of delay in delivery beyond the specified delivery dates. Under the contract such delays as might be due to the action of the United States, or to fires, or unseasonably severe storms, or to strikes, were to be considered as excusable delays against which no liquidated damages were to be assessed. There were nine (9) delayed deliveries. Defendant is now withholding from plaintiff $186.45 as liqui-

dated damages on the first four (4) delayed deliveries, and is withholding also $334.80 as liquidated damages on the last five (5) deliveries.

The evidence in the case makes no distinction whatever between the causes of the first four delays and the causes of the last five delays. All of the delays resulted from the failure of the railroads to promptly accept and transport the blocks to their destination, at times on account of embargoes against receiving such freight at all, and at other times on account of slowness in transportation after accepting the same. None of the delays were due to such causes as would excuse plaintiff from liability for liquidated damages.

The Court, in its Finding No. XIV, clearly recognizes all of the facts just recited; yet the Court draws a distinction between the liability of plaintiff for the item of $186.45 and its liability for the item of $334.80. The distinction is this: The contracting officer treated the first four delays, which would have involved liquidated damages to the amount of $186.45, as "*on account of an embargo placed by transportation companies on all freight shipments and the congested conditions of freight transportation,*" and deeming such delays excusable under the contract he did not withhold the item of $186.45 as liquidated damages, but permitted plaintiff to receive full payment, $186.45 of which was afterwards refunded to the Government by reason of a demand from the Accounting Office; from the last five payments for delayed deliveries the contracting officer withheld $334.80 as liquidated damages. As above stated, the evidence is clear that the same causes were responsible for each of the nine delays in delivery.

The only difference, then, between the first four delays ($186.45) and the last five delays ($334.80) was that the contracting officer waived the contract provisions applicable to said sum of $186.45. The Court rendered judgment for plaintiff as to the $186.45 item and for the defendant as to the $334.80 item. The question raised in this brief, and which defendant seeks to have answered by an amendment to Finding No. XIV as set out in Request No. 1 of its motion, is: *Whether plaintiff's liability for liquidated damages depends upon the conclusions of the contracting officer, or whether such liability depends upon the facts of delay and the terms of the contract itself.*

Since the Court has found for defendant on the $334.80 item, it is evident that the Court agrees with defendant's theory advanced in its original brief to the effect that any defaults of the railroads under Government control were to be regarded as emanating from the Government in its sovereign capacity and not from the Government in its capacity as a party to the present contract. This view is supported by *Deming* v. *United States,* 1 Ct. Cls. 190; *Jones* v. *United States,* 1 Ct. Cls. 383; *Wilson* v. *United States,* 11 Ct. Cls. 513, and *Horowitz* v. *United States,* 58 Ct. Cls. 189.

It is likewise apparent from the Court's decision as to the $334.80 item that the delays are not regarded as chargeable to any cause for which the United States is responsible nor to any excusable cause enumerated in the contract, following the case of *Hathaway & Co.* v. *United States,* 42 Ct. Cls. 267.

If the contractor had the right, *in the face of the established violation of contract terms,* to waive the

provisions of the contract as to the $186.45 item, he could also have waived those same provisions of the contract with regard to the $334.80 item which the Court has said the Government should retain.

It is true the contract says:

> In making settlements in which such charges are involved the contractor shall receive credit for all delays which the contracting officer or his successor may determine to have been due to action of the United States, and for such other delays as the same authority may decide to have been due to such unavoidable causes, including fires, unseasonably severe storms, and labor strikes in the works of the contractor, as occurred before the date or dates upon which delivery is due under the provisions of Article 1, or before the expiration of the time thereafter for which credit is allowed under this Article.

Defendant contends that, under the construction of the laws of the United States with reference to the settlement of Government obligations, the conclusions of a contracting officer as to law are not always binding against the Government. The act of March 3, 1817, 3 Stat. 366, contained a provision which was carried into the Revised Statutes as section 236 and now forms section 305 of the act of June 10, 1921, 42 Stat. 24, as follows:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is con-

> cerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

The General Accounting Office would be precluded from settling claims and accounts on its determination and conclusions if a final conclusion were determined before the claim or account reached the General Accounting Office. Such settlements involve not only a determination of facts, but conclusions of law. Therefore, the contracting officer exceeded his authority in writing into the contract any provision which would make his determination of facts and conclusions of law superior to the conclusions of the accounting officers. The legal liability of the United States is to be determined by the accounting officers upon the finding of facts made by the contracting officer. In the present case the contracting officer found that the first four delays were "*on account if an embargo placed by transportation companies on all freight shipments and the congested conditions of freight transportation.*"

Such a finding of facts by the contracting officer was undoubtedly correct, and such a finding would have applied with equal truth to the last five delays; but as to the last five delays this Court has held that such facts would not excuse liquidated damages under the laws applied to the contract. This, then, again brings up the question with regard to the first four delays as to *whether the legal conclusions of the contracting officer are superior in effect to the legal conclusions of the accounting officers.* It is submitted that the finding of a contracting officer can constitute no more than a *finding of*

facts, and is in the nature of a *special verdict* upon which proper authority will base conclusions of law. Its purpose, as are the findings of fact in this court, is to furnish the basis of a judgment, and is not the judgment itself. Such findings of fact by the contracting officer are not only not disputed by plaintiff but are proven by plaintiff's evidence. Upon that finding of facts a conclusion of law must be based for a determination of financial liability. The contract specifically provides that the facts so found did not relieve plaintiff from its liability for liquidated damages; then, can it be said that the contracting officer had the power or authority to set aside the legal effect of the contract and to give back to the plaintiff the sum of $186.45 which the terms of the contract exacted?

Prior to the creation of the General Accounting Office and requiring it to settle and adjust all claims and accounts in which the United States is concerned without direction from any administrative officer, this court in *McKnight* v. *United States,* 13 Ct. Cls. 292, speaking in reference to the accounting for public funds as the accounting system was then organized under the act of March 3, 1817, 3 Stat. 366, and after adverting to the fact that the accounting officers adjusted certain claims prior to payment and that payment was effected on their certificates, said:

> But vast sums of money are paid to parties for salaries and on other accounts by disbursing officers before the claims have passed the Treasury accounting. * * * They are all under bonds and responsible for the legality and correctness of their payments. Their

> accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightly paid. All others are rejected, and the disbursing officer and his bondsmen are held liable for any balances found against him on such settlement.

In a long line of cases it has been held that, where an officer has been overpaid through mistake of law, such excess payment may be recovered by the Government out of subsequent sums properly payable to him. See:

> *Gratiot* v. *United States,* 15 Pet. 336.
> *McElrath* v. *United States,* 102 U. S. 426.
> *United States* v. *Burchard,* 125 U. S. 176.
> *United States* v. *Stahl,* 151 U. S. 366.

In *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, the court said:

> As a general rule, and on the grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where by misconstruction of the law under which they have assumed to act unauthorized payments are made. *Whiteside* v. *United States,* 93 U. S. 247; *Hawkins* v. *United States,* 96 U. S. 689. The question is not presented as between the Government

> and its officers, or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of actions not authorized by law, resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.

Defendant submits that there is no finality to the *conclusion of law* which the contracting officer applied to his concededly correct *finding of facts* as to the first four delayed deliveries. His conclusion that the plaintiff was not liable for liquidated damages on the four delays mentioned did not harmonize with the provisions of the contract and was therefore contrary to law. Defendant contends that such mistake of law by a contracting officer should not operate to give plaintiff the benefit of $186.45 to which it is not entitled. The United States acts only through officers and agents whose powers and duties are carefully prescribed by statute or authorized regulations, and their authority is a matter of public law with notice of which all who deal with them are chargeable. See:

Sprague v. *United States,* 37 Ct. Cls. 447.
Hawkins v. *United States,* 96 U. S. 689.
Hume v. *United States,* 132 U. S. 406.

Conclusion

For the reasons assigned in points I and II of this brief, it is the opinion of defendant that the

judgment herein should be reduced by the amounts of $6,733.82 and $186.45.

Respectfully submitted.

ROBERT H. LOVETT,
Assistant Attorney General.
EDW. D. HAYS,
Special Assistant to the Attorney General.

Filed July 21, 1924.

A true copy.

Test this 12th day of March, 1925.

[SEAL.] F. C. KLEINSCHMIDT,
Asst. Clerk Court of Claims.

Court of Claims of the United States

No. C–19

WYCKOFF PIPE & CREOSOTING COMPANY, Inc., plaintiff *v.* THE UNITED STATES	No. C–19

I, F. C. KLEINSCHMIDT, assistant clerk, Court of Claims, certify that the annexed is a true copy of a paper, presented for filing by the defendant January 26, 1925, in the above-entitled cause, as the same remains on file and of record in this office in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 12th day of March, A. D. 1925.

[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

EXHIBIT B

In the Court of Claims of the United States

WYCKOFF PIPE & CREOSOTING COMPANY, Inc., plaintiff *v.* THE UNITED STATES, DEFENDANT	No. C–19

DEFENDANT'S MOTION TO INCORPORATE INTO THE RECORD MOTION FOR AMENDED FINDINGS AND NEW TRIAL

Comes now the defendant, by the Attorney General, and moves the court to order that the clerk thereof incorporate into the record, to be certified to the Supreme Court of the United States:

> Defendant's motion to Amend the Findings of Fact and the Conclusion of Law filed Herein by the Court; To Set Aside the Judgment for Plaintiff Rendered on June 2, 1924, for $10,122.99; And to Grant the Defendant a New Trial.

Said motion was filed herein on July 21, 1924, and was overruled on October 20, 1924; a copy thereof is attached hereto and made a part of this motion and marked " Exhibit A."

Defendant represents that it deems the questions of fact which are set forth in said Exhibit A to be material and necessary to properly present the issue in this case to the Appellate Court.

Respectfully submitted.

WILLIAM J. DONOVAN,
Assistant Attorney General.
EDWARD D. HAYS,
Special Assistant to the Attorney General.

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FILED
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WM. R. STA[redacted]

No. [redacted] 282

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

THE UNITED STATES, *Appellant*,

vs.

WYCKOFF PIPE & CREOSOTING COMPANY, INC.

APPEAL FROM THE COURT OF CLAIMS.

REPLY TO MOTION TO REMAND TO THE COURT OF CLAIMS.

HARVEY D. JACOB,
Counsel for Appellee.

March 21, 1925.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 911

THE UNITED STATES, *Appellant*,

vs.

WYCKOFF PIPE & CREOSOTING COMPANY, INC.

APPEAL FROM THE COURT OF CLAIMS.

REPLY TO MOTION TO REMAND TO THE COURT OF CLAIMS.

This case grows out of a contract dated December 10, 1917. Appellee faithfully performed its part of the contract and since performance has endeavored to secure its just compensation. At no time has there been a denial by appellant of its legal liability. The only question seems to be the measure of damages recoverable.

Counsel for appellant throughout the controversy have been either unwilling or unable to comprehend the theory upon which the action is based. By its in-

ability and refusal to permit appellee to perform the work in accordance with the terms of the original agreement, appellant breached the contract. This has at all times been admitted by counsel for appellant. Upon breach by appellant, there were two courses open to appellee,--to immediately consider the contract as broken and to sue for its damage, or, to negotiate a new contract with appellant at a price commensurate with the performance of the work at the time appellee was to perform. Appellee elected the latter course. The Court of Claims so finds when it states as a fact that appellee gave notice to appellant of a higher quotation for performing the work at the time it was performed.

It so happened that when appellant finally desired the work to be performed it also needed additional work of the same character as that called for by the original contract which it had by its delay breached. When this additional work was found necessary appellant requested appellee to bid thereon. Appellee submitted its proposal, in which it detailed every item, and the reasonable cost thereof, which entered into the performance of the work at that date, and gave notice to appellant that the prices quoted for the additional work would be the prices for the work originally contemplated under the broken contract. The Court of Claims specifically finds these facts. Appellant did not immediately accept the bid of appellee. Instead it investigated, analyzed and seriously considered every item of cost, and finally appointed a naval board to determine whether the proposal of appellee was a fair and reasonable price for the performance of the work at the time it was desired. After full investigation this board determined that the proposal as submitted

by appellee was fair and reasonable in all of its items for the work contemplated. Subsequent to this finding, appellee was instructed to proceed with the performance of the work originally contemplated as well as the additional work.

From these facts the Court will have no difficulty in concluding that upon the breach of the original contract appellee sought a new contract by submitting its proposition to appellant, which appellant by its direction to appellee to proceed with performance, accepted. And it is equally true that in this situation it is wholly immaterial whether or not, at the time the new offer was made and accepted, or at the time the work was performed, appellee did or did not have on hand certain material. The price at which appellee might have secured the material, assuming that it did have it on hand, is also irrelevant.

Appellee does not base its case upon any fanciful theory of speculative damage to it. It has asked in its petition only the reasonable value of the work at the time it was performed, and in arriving at this reasonable value it accepts as correct and takes as its test not what it might think is reasonable but only what appellant itself has determined to be fair and reasonable after full investigation by its own governmental boards, which analyzed, item by item, the cost of performing the work at the time it was performed; and upon the basis of this cost, determined by itself, instructed appellee to proceed. The Court of Claims has so found, and the finding of the Court is set out in appellant's present motion under its Paragraph 6 on page 4, wherein it quotes:

> "The reasonable value of the flooring provided for in the original contract, at the times it was

permitted to be laid, based on prices *determined by governmental authority* at about these times to be reasonable prices for the laying of additional flooring of the same kind, was $9,936.54 in excess of the amount plaintiff was paid therefor." (Italics mine.)

This sum of $9,936.54 is all appellee has ever asked of appellant and it is this sum and this sum only for which the Court of Claims gave judgment.

This case has been fully considered by the Court of Claims upon the evidence, both upon the original trial and upon the carefully prepared motion for a new trial which is set out as Exhibit A to appellant's present motion. The facts as found by the Court of Claims are clear and explicit, so much so that this Honorable Court will not have the slightest difficulty, in counsel's humble judgment, of disposing upon final hearing of the issue involved, if in fact there is any real or substantial issue in the case.

In order that the Court might have the complete record before it counsel attaches as Exhibit A appellee's reply to appellant's motion for a new trial, and as Exhibit B, appellee's objections to appellant's motion to incorporate into the record appellant's motion for a new trial, both of these motions being attached as Exhibit's A and B to appellant's present motion.

The present motion should be denied.

Respectfully submitted,

HARVEY D. JACOB,
Counsel for Appellee.

March 21, 1925.

EXHIBIT A.

IN THE UNITED STATES COURT OF CLAIMS.

No. C-19.

WYCKOFF PIPE & CREOSOTING COMPANY, INC.
Plaintiff
vs.
THE UNITED STATES
Defendant

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR A NEW TRIAL—PLAINTIFF'S MOTION FOR AMENDED FINDINGS OF FACT.

The argument of defendant in its motion for a new trial, aside from being mere repetition of the contentions advanced in its brief and in its oral argument before the Court, entirely overlooks the principle of law upon which plaintiff's right to recover is predicated. The identical argument of defendant has been considered by the Court and has been decided adversely. There is no new evidence referred to nor is there any other ground for a new trial called to the Court's attention. Defendant seeks merely a reargument of the same questions raised by it in the previous hearing.

A restatement of the theory upon which this case is founded should result in a denial of defendant's motion, and, likewise, in the Court amending its findings by the complete omission of findings IX and X, for which plaintiff now prays.

It is unnecessary to repeat the facts of the controversy. Suffice it is to say that by the Government's refusal to permit plaintiff to proceed with the contract work until from one to two years after it should have been performed, the Government breached the obligation of the contract. Upon this breach of the contract plaintiff had the right to consider the contract as broken and thereupon sue for its actual damage, or to seek a new contract for the performance of the work. Plaintiff did not elect to sue for its damage until it had attempted to negotiate a new contract for the identical work, *but at a price commensurate with its belated performance.*

After the breach and before any of the work was performed, plaintiff gave notice to the Government that it could not and would not proceed upon the price specified in the contract. In giving a quotation for additional work, as found by the Court in Finding No. VI, plaintiff insisted that "this quotation covers what we have previously offered and are under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917." Inasmuch as the contract referred to had been broken by the Government, this suggestion of plaintiff was tantamount to an offer to defendant to do the work specified in the broken contract at a price in keeping with the cost of doing the work at the time defendant desired it to be done. Defendant then had the option of accepting the new offer of plaintiff or of rejecting the same and having the work done in such manner as it might deem to its best interest. Defendant did not immediately accept plaintiff's offer but appointed boards to investigate the set-up of plain-

tiff's figures to see whether or not its price was reasonable. After being fully informed of the facts, defendant instructed plaintiff to proceed with the performance of the work, thereby accepting the *new offer of plaintiff* to do the identical work but at the new price named therein.

These facts constitute an entirely new and independent contract, and it is upon this new contract that plaintiff seeks to recover the price of the work as mutually agreed upon.

The least that can be said is that these facts raise an implied promise to pay the reasonable value of the service performed, and *this reasonable value has been settled and agreed upon by defendant.*

The facts above set out are amply proven by the record and are found by the Court in its findings. Upon these facts, it is wholly immaterial and irrelevant whether or not, at the time the new offer was made and accepted or at the time the work was performed, plaintiff did or did not have on hand certain material. The price at which plaintiff might have secured the material, assuming that it did have it on hand, concerning which the record is not clear, is also irrelevant. Plaintiff's sole obligation was to do a definite piece of work at a price agreed upon and defendant's sole obligation was to pay this price, which, after full investigation, it deemed to be reasonable and contracted to pay. Plaintiff performed the work promptly and efficiently and all that now remains of the new contract is for defendant to pay the price agreed upon, which defendant for more than four years has neglected to do.

It is insisted that when the case is considered in its true light it becomes wholly immaterial whether or not

any extra expense was incurred by plaintiff by reason of the lengthy delay, caused by the Government, in the performance of the work, or whether at the time the new contract was made to perform the work at prices mutually acceptable certain of the material necessary to perform the work was in possession of the plaintiff or had to be purchased in the open market.

It is, therefore, respectfully insisted that the Court should amend the Findings of Fact only by striking out entirely Findings Nos. IX and X upon the ground that the same are wholly immaterial to a decision of the real question involved in the controversy.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Plaintiff.

IN THE

COURT OF CLAIMS OF THE UNITED STATES

No. C. 19

WYCKOFF PIPE & CREOSOTING COMPANY, INC., *Plaintiff*,
vs.
THE UNITED STATES, *Defendant*.

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S MOTION TO INCORPORATE INTO THE RECORD DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant's present motion is most unusual.

Paragraph 3 of Supreme Court Rule 8 provides that the record shall contain

> "in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings *which are necessary* to the hearing in this Court."

Defendant's motion represents that the "questions of fact" contained in its overruled motion for a new trial are "material and necessary" to properly present the issue, and should, therefore, be made a part of the record.

As has previously appeared to the Court, defendant's motion for a new trial contained nothing more substantial than a restatement of its trial brief and a reargument of the questions therein advanced. As

was the trial brief, it was presumably based upon the *facts contained in the record,* and how such motion for a new trial can add to and take away from the facts of a closed record is not understood.

To grant the present motion would be in effect to grant a new trial, which the Court has refused to do, and to incorporate into the findings of facts as facts the fanciful theories of the signers of the motion,—Messrs. Lovett and Hays,—witnesses plaintiff has had no opportunity of cross-examining.

The argument of counsel on the motion for a new trial is no more *necessary* to the hearing in the Supreme Court than are the original arguments in the trial briefs. These, of course, at the proper time might assist the Court, but for the present, previous arguments are important only to counsel and that because we sometimes are pleased with our handiwork and sometimes we are either too busy, et cetera, to rewrite and revise our previous good efforts. The record necessary to a "hearing" of the case in the Supreme Court was made and closed months ago. The Supreme Court does not desire the record to contain the "hearing" itself. In due season, counsel for each party will have an opportunity of *testifying* or arguing from the record of *proven facts* to as full an extent as the Supreme Court will tolerate.

The present motion should be denied.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Plaintiff.

Office Supreme Court,
FILED
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WM. R. STANS

NO. 282.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE UNITED STATES, *Appellant,*

vs.

WYCKOFF PIPE & CREOSOTING CO., INC.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

HARVEY D. JACOB,
Attorney for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 282.

THE UNITED STATES, *Appellant*,

vs.

WYCKOFF PIPE & CREOSOTING CO., INC.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

THE FACTS.

The Solicitor General adequately states the facts of the case. The Government concedes liability upon the facts. The sole question concerns the measure of damage.

THE LAW.

The contract was entered into December 10, 1917, and appellee was to perform the work during the spring of 1918. Appellee was not permitted to do any of the work until January, 1919, and thereafter was delayed and interfered with by the Government until August, 1919, and April, 1920. During this war period prices of labor, material and other items were constantly mounting.

The findings enumerate the items of damage, but the evidence did not establish the amount of extra expense incurred upon each particular item.

In each instance when the Government permitted appellee to perform the contract work, additional work of the same character was also desired by the Government. For this additional work, appellee was requested to submit a proposal in which each item entering into the cost of doing the work at that time was analyzed. Such proposals for additional work of similar character was studied by the public works officer and found to be reasonable. The proposals were then submitted to a naval board appointed for the purpose of passing upon the reasonableness of the items involved, and in each instance this naval board found the cost of doing the work as submitted by appellee entirely reasonable and ordered appellee to proceed with performance. Inasmuch as the parties had, after full investigation, agreed upon the cost of doing the work at the time performance was permitted, it was felt that exact proof as to the amount of extra expense of each item was unnecessary even had it been practicable for appellee to secure evidence with any degree of certainty.

The court below accepted evidence of the agreement of the parties as to the cost of performance and estimated appellee's loss and damage upon the basis of the cost of doing similar work as agreed upon by the parties. It so happens that the court below also found that this agreed cost of doing the work was the reasonable value of the work to the Government and in so doing has found that the Government has received a benefit equal to the amount of the judgment now before this court.

The Government now contends that appellee should have proved, *item by item, the exact amount* of expense and loss caused to it by the unwarranted delay and interference,—a burden upon appellee, who never was at fault, well nigh impossible to meet. It is especially contended that because appellee showed splendid business judgment in securing certain quantities of lumber necessary to perform the contract at the time the contract was entered into and because the price of lumber increased between the time it was purchased and the time it was used in performance of the contract, that the Government should have the benefit of the increased price in lumber, less the cost of storage, insurance, etc. This contention is made by the Government without any showing upon its part that the cost of insurance, storage, overhead, interest upon investment and other carrying charges on the lumber and the necessary shrinkage of the same in storage was less than the difference in its cost and its value at the time the contract was performed.

Appellee proved that at the time the work was done even a naval board, after full investigation, agreed that the cost of doing exactly similar work was as great as appellee now contends was the cost to it of doing the

contract work. It is also reasonable to suppose that appellee's estimation of the cost of the additional work so readily agreed to by the Government as reasonable was much below the price for which the Government could have secured a performance of the additional work elsewhere, in view of the fact that appellee *did have lumber on hand*, its force of employees on the ground and a plant equipped and ready at the moment to do the precise work.

The Government contends that the correct measure of damage for the delay was the loss actually sustained by the contractor as the result of the delay. Appellee makes the same contention.

The Court of Claims sits both as judge and jury. The witnesses are before it and it views the evidence in the light of trial circumstances. The rule of law just above stated has been upon the books since the Civil War. The court below must be presumed to know it. *In arriving at the amount of the loss actually sustained by appellee* as the result of the delay, the court below felt it unnecessary to impose upon the party not at fault, the burden of doing an almost impossible, thing *i. e.*, proving in detail, item by item, the ever increasing cost during a war period of labor, material, freight rates, storage space, insurance and other carrying charges. The court was justified in its action, especially since both contracting parties, at the very time the work was finally performed, sat across the table and mutually agreed upon the cost of performing exactly similar work, and especially since the relation of appellee to the work was such as would indicate that the price submitted by appellee and accepted after full investigation by the Government was more than a reasonable price for performance.

That the court below should also find that the value of the work to the Government was equal to the cost should operate in the favor of appellee rather than against it, because in practically every reported case where damages have been awarded for delays caused by the Government, the Government has received little if any value in return.

The Government relies upon the cases of United States vs. Smith, 94 U. S. 214; United States vs. Mueller, 113 U. S. 153; United States vs. Barlow, 184 U. S. 123; Ripley vs. United States, 223 U. S. 695. Appellee relies upon the same cases. Appellee contends that when properly analyzed these cases fully support its position.

Proof of damage caused by delay, especially during war periods, is exceedingly difficult. Everyone knows that it is being incurred, but to properly allocate a portion of the overhead of a plant engaged in other work to the particular contract being delayed is well-nigh impossible; and it is even more difficult to determine the exact cost of holding a plant, its machinery and force of labor ready upon a moment's notice to begin performance. It is to be borne in mind that once a contract of this character is delayed, the plant and force of men must at all times be held in readiness to immediately begin performance when the defaulting party is ready; otherwise the party not at fault might be charged with a failure to minimize the damages and indeed might itself be accused of delay.

Courts recognize these facts, and whether it be a judge or a jury which assesses the damages, there must enter into the award a certain amount of "estimation" to cover obvious losses which cannot with exactness be proved. This court has repeatedly rec-

ognized the Court of Claims as both judge and jury.

In the Smith case, *supra,* this court said that,—

> "In the estimation of damages, the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The court is not permitted to guess any more than the jury; but, like a jury, it must make its estimate from the proof submitted. The result of the best judgment of the triers is all that the parties have any right to expect."

The Smith case involved a delay caused by interference, and is strikingly similar to the case at bar. The court below held that the damages for the delay should be that sum which "in its opinion" from the evidence before it was necessary to place Smith in the same condition he would have been in if he had been allowed to proceed without interference; and it is curious to note that "in the opinion" of the court below, the amount that Smith was damaged was exactly $5,000.00. Such round sum award negatives any thought that the court below had before it exact proof, item by item, of "the loss actually sustained by the contractor as the result of the delay."

This court in affirming the judgment of the Court of Claims concluded its opinion by the language above quoted.

The case of United States v. Mueller, *supra,* was also very similar to the case at bar in that it was a suit for damages for a delay and interference caused by contemplated change of purpose in regard to the stone to be used for the contract work. In the Mueller case as in the case of Smith, the award was for a sum in round figures, *i. e.,* $20,000.00, from which fact it is

apparent that once again the court failed to have before it detailed proof, item by item, of the precise amount of loss caused by the delay; and that once again the court below estimated the damages from the proof before it as best it could; and that once again this court affirmed without comment the "estimation" of damages by the court below.

It is earnestly insisted that a trial court could have no better evidence of a loss caused by an unwarranted delay than the difference in the cost of doing the work at the time it should have been done and at the time it was actually done. As is apparent from the record in this case, the court knew from the contract the cost of performing the work at the time performance should have been permitted, and it also had before it the mutual agreement of the parties, arrived at only after thorough investigation by a naval board, as to the reasonable cost of doing the work at the time it was actually performed. Better evidence of the amount of loss and damage to the party delayed is not conceivable. Certainly such evidence is sufficient to warrant the court below in "estimating" damages.

An examination of the decisions of this court and of the Court of Claims in both the Mueller and Smith cases fails to disclose what evidence the court below had before it, but appellee feels safe in asserting that the court did not have before it a voluntary agreement of the parties as to the cost of doing the work at the delayed time; and the peculiar coincidence that the judgments in both the Smith and Mueller cases happen to be in round figures very plainly indicates that there was more "estimating" in those cases than in the instant case, because in the instant case the court did have a rule upon which to base the damage and that rule it applied with exactitude in its judgment.

The Government does not contend that what the court below did was inherently wrong,—it even intimates that the allowance of a cost of doing the work equal to a reasonable value would not produce an erroneous result. The sole contention of the Government is that because appellee earnestly sought to carry out its contract obligation and was diligent enough to purchase a part of the lumber required for the performance of the work, and that because the price of lumber increased, it should have the benefit of such increase in price. Appellee insists that since the Court of Claims had a reasonable rule for the estimation of damages, both in law and in fact, the burden of showing that such a basis was wrong shifts to the Government; and that until the Government can prove that the increase in the price of the lumber was greater than the loss by the shrinkage thereof and the cost of overhead, storage space, insurance, interest upon investment, and other items, its contention must fail.

It is reasonable to assume that were it possible for the truth to be known, the cost of carrying this lumber in stock was equally as great, if not in excess of the increase in the price thereof, because as above pointed out, where a contract is delayed there are so many elements of damage which never can be determined, that the party not at fault must necessarily lose even if he secures an award for all that can be given under the law and under the rules of evidence.

There is another way of looking at this case:

It is apparent from the record that when appellee knew that it was being damaged by the delay and be-

gan feeling around as to how best to protect itself, it was not receiving the benefit of legal counsel. Appellee had no desire to rescind the contract or to embarrass the Government during the war period. Although it was being greatly damaged it desired to proceed with the work as soon as the Government was ready, but inasmuch as it was being damaged without fault of its own, it sought to protect itself from loss. Appellee first inquired of the Government as to whether there was any precedent for making claim for the loss by delay and it stated to the Government that it was almost impossible to determine what the loss would be until the work was performed. The Government recognized the justice of appellee's claim and stated that final claims might be deferred until the work was done. Such action by the parties brought the case clearly within the settled law whereby actual loss caused by delay or interference might be recovered; and had the parties ceased negotiations at that point, the present contention of the Government would have greater force.

But as the time arrived for the performance of the work in each of the shops the Government desired additional work of the exact character. Believing appellee best equipped to do the additional work econonomically, the Government asked for a setup of figures as to the reasonable cost of performing the additional work. Appellee submitted such figures, item by item, and in so doing requested—

> "a readjustment of the *contract price* to cover the advance in the cost of materials during the past year and the advance in the cost of labor." (R. 33.)

And again that.—

> "this quotation (for additional similar work) covers what we have previously offered and are under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917."

The new quotation was for $2.68 per square yard in one instance and in a later instance it was for $3.28 per square yard.

The Government did not immediately accept the figures of appellee. Its public works officer first analyzed the same and found them to be reasonable, but as such matters are handled in the navy, the itemized quotation of appellee was submitted to a naval board. This board investigated the situation fully and reported that the quotation of appellee was a reasonable price for the doing of the work at the time it was to be done. *Thereupon, the Government instructed appellee to proceed with the doing of both the contract work and the additional work.*

It is admitted that appellee had no intention of rescinding its contract, but the facts above detailed suggest that the original contract, insofar as price was concerned, was probably mutually abandoned by the parties. If we are correct in this contention, appellee is entitled to recover the new price mutually agreed upon.

CONCLUSION.

Appellee has been deprived of its damages for seven years in a case where the Government admits liability. The only dispute is as to what is the measure of damage. It is insisted that the Court of Claims had ample

basis upon which it could justly award the sum it has awarded, and it is furthermore insisted that the court has not gone any farther afield in this case, if as far, as it went in the Smith and Mueller cases, *supra*, both of which were affirmed by this court almost without comment insofar as the amount of damages was concerned.

It is regrettable that the time of the court must be taken with a case so small. Appellee, however, did not appeal. While as is stated by the Solicitor General, the amount is small insofar as the business of this court is concerned, it is quite large to this appellee. To grant the Government's contention that the case should be remanded would be but to penalize and further deprive appellee of its just due and in the end, it would probably develop that the actual loss to appellee, proved item by item and in detail would be as much if not greater than the parties at the time and with full knowledge of the facts agreed to be the reasonable cost of the work.

The judgment should be affirmed.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Appellee.

April, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 282.—October Term, 1925.

United States, Appellant,
vs.
Wyckoff Pipe & Creosoting Co., Inc.
} Appeal from the Court of Claims.

[May 24, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Wyckoff Pipe & Creosoting Co., Inc., contracted with the United States, in December, 1917, to lay creosoted wood block floors in Navy Yard buildings at Norfolk, Virginia, furnishing all necessary labor and materials. On a part of the job the contractor was to begin the work immediately after delivery of a copy of the contract. This part was to be completed within 30 days thereafter. On other parts, work was to be deferred until such time as the Government was ready to proceed. These parts were to be finished within 43 days from the dates on which they were begun. The flooring was to be set in a concrete base which was to be laid promptly by the Government. The contractor prepared itself immediately to perform the contract. Among other things, it purchased the lumber and creosote oil needed for the job. Long delays by the Government in furnishing the concrete bases prevented performance by the contractor. Thus more than two years elapsed before the work was completed. The contractor was without fault.

The Government's delays confessedly caused the contractor some loss. For the loss so suffered the Government was confessedly liable. It made payment at the fixed contract rate of $2.26 per square yard—and paid an additional amount, also provided by the contract, equal to 50 per cent. of the estimated increase in the labor cost. It paid nothing otherwise on account of the damages caused by its delay. To recover compensation for the loss suffered, this suit on the contract was brought in the Court of Claims in January, 1923. That court assessed the damages at $10,122.99;

and for that amount it entered judgment, without an opinion, on June 2, 1924. 59 Ct. Cl. 980. The case is here on appeal under § 242 of the Judicial Code. The only question presented is whether there was error in the measure of damages adopted.

The findings of fact recite that the contractor, in reserving its right to claim damages for extras by reason of the long unanticipated delay, had enumerated as items of the proposed claim extra labor on account of the advance in the scale of wages, extra expense by reason of renewal premiums on surety company bonds, additional freight rates on sand and other material, additional cost of sand, additional cost of creosote oil, storage, insurance, and carrying charges "on a large stock of lumber purchased for the account of your contract and carried in our yard for a space of between one and two years." The findings also recite that the record does not disclose by items the amount of extra expense incurred by the contractor by reason of the lengthy delay in the performance of the work. The court made no finding or estimate of the loss so incurred. It found merely that the increase in the prevailing market price of lumber from the time that used was bought by the contractor until it was actually employed on the job was $6,021.23; that the increase in the prevailing market price of the creosote oil required from the time it was purchased for the job until it actually was so used amounted to $712.59; that the reasonable value of the contract work per square yard at the time it was actually performed was, for a part $2.68, for a part $2.98, and for the rest $3.28; and that the reasonable value of the whole work at the time it was done by the contractor, based upon prices then paid by the Government on other work then done at the Navy Yard, was $9,936.54 in excess of the amount which the contractor had received. It was for this sum of $9,936.54, plus an item of $186.45 about which there is no dispute, that the Court of Claims entered its judgment of $10,122.99.

The Government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay, *United States* v. *Smith*, 94 U. S. 214; *United States* v. *Mueller*, 113 U. S. 153; *Ripley* v. *United States*, 223 U. S. 695; that the increase in the market value of materials

purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon *quantum meruit*. The contention is, in our opinion, well founded.

The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the Government's delay. After completing performance it brought this suit declaring on the original contract.

The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the Government job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare *Erie County Natural Gas & Fuel Co.* v. *Carroll*, [1911] A. C. 105. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job.

It is argued that the Court of Claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable, compare *United States*

v. *Smith*, 94 U. S. 214, 219; and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be regarded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the material during the period of the delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error.

The judgment must be reversed. As there are no findings from which the amount of the loss can be determined, the case is remanded for further proceedings.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.